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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 826.

S. BROWN ALLEN, AUDITOR OF PUPLIC ACCOUNTS OF THE STATE OF VIRGINIA, ET AL., APPELLANTS,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED MARCH 4, 1884.

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1 In the Circuit Court of the United States of America for the Western District of Virginia and Fourth Circuit.

Be it remembered that heretofore, to wit, on the 16th day of April, in the year of our Lord one thousand eight hundred and eighty-three, the following decree was entered of record in the case of the Baltimore and Ohio Railway Company against S. Brown Allen, auditor of the State of Virginia, D. R. Revely, treasurer of the State of Virginia, and John Ed. Hamilton, treasurer of Augusta county, Virginia, which order is in the words and figures here following, to wit:

In the Circuit Court of the United States for the Western District of Va.

THE BALTIMORE & OHIO RAILROAD CO.

v.

S. B. ALLEN, Auditor, & others.

The Baltimore & Ohio Railroad Company, this 16th day of April, 1883, presented their bill of injunction, with accompanying exhibits, to restrain the sale by the defendants of certain property of said company for taxes alleged to be due to the State of Virginia,
2 and the court being of opinion that a rule upon the defendants should issue, accompanied by a copy of said bill and exhibits, to show cause why said injunction and the prayer of said bill should not be granted, said rule to be returnable before the justices of this court at twelve o'clock, on Monday, April 23d, at Richmond, Va.; and the defendants, by the Hon. F. S. Blair, attorney general of Virginia, having accepted service of said rule and copy of said bill and exhibits, it is ordered that, as said matters, hearing be had as above set forth, and affidavits on behalf of the said Baltimore & Ohio Railroad Company and of said defendants may be filed to be considered at said hearing, upon service of copies thereof prior to said hearing, upon the party against whom the same are to be presented.

And at another day, to wit, on the 15th day of May, in the year of our Lord one thousand eight hundred and eighty-three, the following order was entered of record in this cause, which is in the words and figures here following, to wit:

3 In the United States Circuit Court for the Western District of Virginia, sitting at Harrisonburg

THE BALTIMORE & OHIO RAILROAD COMPANY.

v.

S. BROWN ALLEN, Auditor, & others.

This cause came on to be heard this 15th day of May, 1883, upon the bill and exhibits, the affidavits filed in support of the bill, the answer of S. Brown Allen, auditor of Va., Dr. Revely, treasurer of Va., and John Ed. Hamilton, treasurer of Augusta county, Va., which are filed and treated as affidavits, and the other affidavits filed on behalf

of the defendants, and the prayer for an injunction as set forth in the bill; and the defendants, by their counsel, the attorney general of Va., consenting that the tender of coupons as stated in the bill to the first auditor of Va. shall be treated as made, also to the second auditor of Va. the cause was argued by counsel; on consideration whereof the court is of opinion that the tender of coupons by the complainant was a valid tender in payment of the taxes assessed as stated in the bill, and that the liens made by John E. Hamilton, treasurer, &c., to collect said taxes thereafter were, and are, upon the averments of the bill, illegal; and the court doth now a., o., and d. that a preliminary injunction be, and is now hereby, awarded in behalf of the complainant, The Baltimore and Ohio Railroad Company, to restrain the defendants and any therefrom proceed-
4 ing to collect said taxes or to enforce said liens, or any of them, as set forth in the bill. But this injunction shall not take effect until the complainant, or some one for it, shall execute bond before the clerk of this court at Harrisonburg, with sufficient surety, in the penalty of seventeen thousand ($17,000) dollars, conditioned according to law, and to be approved by this court, and upon the execution of such bond the said clerk shall issue injunction process to the defendants in conformity with this decree.

HUGH L. BOND,
Cir. Judge.

The following is the bond given in this case, and is in the words and figures here following, to wit:

Know all men by these presents, that we, The Baltimore and Ohio Railroad Company, principal, and W. B. Compton, Gilbert S. Meem, and John M. Miller, sureties, are held and firmly bound unto S. Brown Allen, auditor, D. R. Reveley, treasurer, and John E. Hamilton, treasurer of Augusta county, Virginia, in the sum of seventeen thousand dollars; to the true payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

5 Sealed with our seals, and dated this the 23d day of May, 1883, and of our Independence the 107 year, and we, and each of us, hereby waive the benefit of our homestead exemption as to the obligation of this bond.

The condition of the above obligation is such, that whereas the above-bound The Baltimore and Ohio Railroad Company hath obtained from the judge of the circuit court of the United States for the western district of Virginia an injunction to restrain and inhibit S. Brown Allen, auditor of Virginia, D. R. Revely, treasurer of Virginia, and John Ed. Hamilton, treasurer of Augusta county, Virginia, their successors, attorneys, agents, and servants, from taking any steps or proceedings for or towards the collection of any of the taxes or alleged taxes referred to in the bill, or from distraini-g or maintaining any distress or levy upon any property mentioned in the bill, or from seizing, removing, or selling, or in any manner interfering with said property until the further order of the court:

Now, if the said Baltimore and Ohio Railroad Company shall well and truly pay, or cause to be paid, all such costs and damages as may be awarded against it, or incurred by any other interested person in case the said injunction shall be dissolved, then and
6 in that case the above obligation is to be void; otherwise, to remain in full force and virtue.

THE BALTIMORE & OHIO RAILROAD COMPANY.

[SEAL.] By ROBERT GARRETT,

1st Vice-President.

Attest: W. H. IJAMS, *Sec'y.*

WM. B. COMPTON. [SEAL.]

Witness as to W. B. Compton:
W. B. LURTY, *Clerk.*

GILBERT S. MEEM. [SEAL.]

Witness as to Gilbert S. Meem:
R. E. KINNY.

JOHN M. MILLER. [SEAL.]

Witness as to John M. Miller:
THOMAS C. PRINCE.

UNITED STATES OF AMERICA, *Western District of Virginia:*

I, W. B. Lurty, clerk of the circuit court of the United States for the western district of Virginia, do certify that W. B. Compton, whose name*d* is signed as surety to the above bond this day, made oath before me that his property is worth the sum of seventeen thousand dollars over and above all his debts.

Given under my hand this, 23d May, 1883.

W. B. LURTY,
Clerk U. S. Courts.

7 The following is a true copy of the bill and exhibits filed in this case, and are in the words and figures here following, to wit:

To the honorable the judges of the circuit court of the United States for the western district of Virginia:

The Baltimore and Ohio Railroad Company, a corporation created by the State of Maryland, and a citizen thereof, brings this its bill against S. B. Allen, auditor of public accounts for the State of Virginia, residing in Richmond, in said State, and David R. Revely, treasurer of said State of Virginia, residing at Richmond, in said State of Virginia, and John Ed. Hamilton, treasurer, residing at Staunton, in said State of Virginia:

First. That, as lessee, your orator has for many years been running and operating the lines of the Winchester & Potomac Railroad Company, the Winchester & Strasburg Railroad Company, and what is designated on the assessment list, hereafter exhibited as the Strasburg and Harrisonburg Railroad Company, the line referred to being, in fact, that part of the old Manassas Gap railroad lying between the town of Strasburg, in the county of Shenandoah, and the

town of Harrisonburg, in the county of Rockingham, in the
8 State of Virginia, the said three lines of roads constituting one continuous line of railway from the boundary line of the State of Virginia and West Virginia to the said town of Harrisonburg.

Second. That the defendant, S. Brown Allen, is, and at all such times was, the auditor of public accounts of the said State of Virginia, and that the defendant, David R. Reveley, was and is treasurer of the said State, and that the defendant, John Ed. Hamilton, was and is the treasurer of Augusta county, to whom the said S. B. Allen, under the circumstances and for the purposes hereinafter stated, has delivered the assessment or alleged assessment against your orator, hereinafter referred to; that is, against the companies aforesaid, of which your orator is lessee.

Third. Your orator further says that the Winchester and Potomac Railroad Company, the Winchester and Strasburg R. Road Company, and the Manassas Gap Railroad Company were duly incorporated by the State of Virginia, and organized as bodies politic under the laws of said State, the name of the Manassas Gap Railroad Company having, by successive acts of the General Assembly of Virginia, been changed and finally merged into that of the Virginia Midland Railway Company, which is the existing corporate name of your orator and lessor.

Fourth Your orator further says that on the 30th day of
9 March, 1871, an act of the General Assembly of Virginia, entitled "An act to provide for the funding and payment of the public debt," was approved. By said act the State of Virginia undertook to call in its outstanding indebtedness from the hands of its creditors, and proposed to deliver to such creditors new bonds for two-thirds of the amounts due to them, respectively, to run thirty-four years after date, but to be redeemable at the pleasure of the State after ten years, the interest to be payable semi-annually on the first days of January and July in each year, and, at the option of the creditors, coupons for interest were to be attached to said bonds, payable to the bearer of said coupons; and as a part of said act and of the arrangement and contract between the State of Virginia and its creditors, it was expressly provided that "The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues, and demand- due the State, which shall be so expressed on their face."

The remaining one-third of said creditor's claims was adjusted by the issue of certain certificates described in said act, which were to await a settlement between the States of Virginia and West Virginia in regard so the public debt of the State of Virginia existing at the time of its dismemberment. As a matter of fact, bonds of the
10 Commonwealth of Virginia with coupons for interest attached, and with these words expressed on their face, "Receivable at and after maturity for all taxes, debts, dues, and demands due the State," were in consideration of the surrender of the old bonds of the State as aforesaid issued to the amount of twenty millions of dollars; and such coupons, payable to bearer as aforesaid,

have, since said bonds were issued as aforesaid, been marketable as negotiable securities and uniformly received in payment of all dues, taxes, debts, and demands due the State, in pursuance of the provisions of said act, and of repeated decisions of the supreme court of appeals of Virginia and of the Supreme Court of the United States. The Chief Justice of the United States, in the recent decision in the case of Antoin *vs.* Greenough announced as the decision of said Court that the receivability of such coupons in payment of all taxes, debts, dues, and demands of the State of Virginia, is no longer an open question.

Fifth. Your orator further says that, by the 20th and 21st sections of an act of the General Assembly of Virginia, approved on the 22d day of April, 1882, and entitled "An act for the assessment of taxes on persons, property, income, and licenses, and imposing taxes thereon for the support of the government and free schools
11 and to pay the interest on the public debt," provision was made for the assessment and taxation of the railroads within the State, the board of public works, acting upon the reports of the officers of the railroad companies, and upon the best and most reliable information that could be procured, being authorized and required to ascertain and assess the value of the real and personal property of such companies for taxation at the rate of forty cents on every hundred dollars of the estimated value thereof; and said act further provides that it shall be the duty of every railroad company so assessed to pay into the treasury of the State, within sixty days after receipt of notice of such assessment, the tax imposed by law; and a company failing to pay the tax assessed upon its property shall be immediately assessed under the direction of the auditor of public accounts, by any person appointed by him for the purpose, rating their real estate and rolling stock at $20,000 per mile, and a tax thereon levied of forty cents on the $100.00 of such fixed value; and the amount so assessed be collected by any treasurer to whom the auditor may deliver the assessment, who is authorized to distrain and sell any personal property of such company for the amount of such taxes.

12 Your orator further says that on the 22d day of November, 1882, the said board of public works, under and by virtue of said last-named act, met in the city of Richmond and made their assessments against the railroad companies; a printed copy of which, issued by the auditor of public accounts, is herewith exhibited, marked "X," and prayed to be taken and read as part of this bill.

From Exhibit "X" your honors will see that the three roads leased by your orator are assessed for taxation at the rate of $15,000.00 per mile, and that the amounts of tax required to be paid by them respectively were as follows, to wit: The Winchester & Potomac Company, $703.72; The Winchester and Strasburg Company, $1,144.00; and the Strasburg and Harrisonburg (or as hereinbefore explained, The Manassas Gap R. R. Company,) $2,970.40—making altogether $4,818.12. It will also be seen that the Valley Railroad Company was assessed with income tax $22.04, & 1,571.00, the tax on real and personal property—making altogether $1,593.04. Of these assess-

ments notice was given to and received by your orator on the 17th day of January, 1883, as the recognized party liable for said taxes, and your honors will perceive from said act, approved April 22d, 1882, section 20, that it thereupon became and was the duty of your orator, within sixty days from the receipt of said notice,
13 to pay into the treasury of Virginia the several sums of money aforesaid due the State.

Sixth. Your orator further says that by the Code of Virginia (1873), chapter 43, section 7, it is provided "that all moneys to be paid into the treasury of the State shall be paid by the person liable to pay the same, or his agent, into one of the banks in the city of Richmond, in the following manner: A warrant shall be obtained from the auditor of public accounts, or the second auditor, as the case may be, directing the treasurer to receive the sum to be paid; the treasurer shall, by his order upon the said warrant, require the cashier of one of the said banks to receive the sum therein mentioned," &c. And your orator further says that by law all taxes are payable into the treasury upon the warrant of the auditor of public accounts.

Seventh. And your orator further shows that on and before the 16th day of March, 1883, your orator held and was the owner of the coupons for interest issued under the aforesaid act, approved on the 20th day of March, 1871, entitled "An act to provide the funding and payment of the public debt," which are hereinafter described and shown, which coupons were and are, as described by said act, declared on their face to be receivable for all taxes, debts, dues,
14 and demands due the State, and under the Constitution of the United States are so receivable.

Eighth. And your orator further says that on the said 16th day of March, 1883, and within the period of sixty days from the receipt of notice of assessment as aforesaid, your orator, by its counsel, Hugh W. Sheffey, and the assistant to its 1st vice-president, John W. Davis, acting for said railroad companies and for your orator as lessee of said roads holding the coupons for interest aforesaid, obtained from the auditor of public accounts a warrant to pay into the treasury the sum of $703.72, the amount of taxes assessed as aforesaid against the Winchester & Potomac Railroad Company, and a further warrant to pay into the treasury the sum of $1,144.00, the amount of tax assessed against the Winchester and Strasburg Railroad Company, and a further warrant to pay into the treasury the sum of $297.40, the tax assessed against the so-called Strasburg and Harrisonburg Railroad Company.

And thereupon the treasurer of the Commonwealth, acting by his chief clerk, he being absent, required, by endorsement on said warrants, said several sums to be paid into the Merchants' National Bank of the city of Richmond, which was, and is, one of the banks authorized by law to receive moneys into the treasury of the
15 State upon the warrant of the auditor of public accounts and the order of the treasurer as aforesaid.

Ninth. And your orator further says that on the said 16th day of March, 1883, your orator's counsel and representative, and the rep-

resentative and counsel of said railroad companies, in payment of said several sums of money, tendered to John F. Glenn, Esq., cashier of said Merchants' National Bank, coupons for interest issued as aforesaid under said act of March 20th, 1871, and silver coin for fractions, in manner following, that is to say, for the amount due for taxes from the Winchester and Potomac Railroad Company the sum of $702.00 in coupons as aforesaid and $1.75 in silver coin for the amount due for taxes from the Winchester and Strasburg Railroad Company, the sum of $1,143.00 in coupons as aforesaid and $1.00 in silver coin for the amount due for taxes from the Strasburg and Harrisonburg Railroad Company, so called, as aforesaid, the sum of $2,970.00 in coupons as aforesaid and $0.40 c. in silver coin. From Exhibit X 7 and Exhibits X 5 & 6, hereinafter shown, it will appear that in payment of the two warrants for $22.04 and
16 $1,571.00 for taxes due from the Valley Railroad Company like tenders in coupons and coin were made at the same time. And your orator further shows that thereupon the said John F. Glenn, Esq., cashier as aforesaid, refused to accept and receive the coupons and coin aforesaid in payment of said several sums due for taxes to the States, and endorsed his refusal upon the respective warrants aforesaid.

And your orator now here shows and exhibits the warrants aforesaid, marked "X^2," "X^3," and "X^4," "X^5," and "X^6," and a writing containing a detailed statement of the coupons and coin so tendered, duly certified to be correct by said cashier, marked "X^7," all of which exhibits your orator prays may be taken and read as part of this bill.

And thereupon your orator, by its counsel and representative aforesaid, set apart and sealed upon the coupons and silver coin tendered as aforesaid, and here offers to bring and doth bring the same into this honorable court, subject to its order and decree, in satisfaction and payment of the taxes assessed as aforesaid.

Tenth. And your orator further says, that afterwards on the same day, that is to say, on the 16th day of March, 1883, its said counsel and representative made like tenders in the offices of the
17 treasurer and *and* auditor of public accounts of the State, in the former to —— Taylor, chief clerk, and acting treasurer, the said David R. Revely, the treasurer, being absent, and afterwards in the latter to W. R. Smith, chief clerk and acting auditor, the auditor, S. Brown Allen, being absent, and the tenders so made were severally and successively refused.

Eleventh. And now, may it please your honors, notwithstanding the premises and facts aforesaid, which your orator avers are true, the auditor of public accounts aforesaid, S. Brown Allen, Esq., wrongfully and illegally has proceeded to assess, or caused to be assessed, the real estate of said companies at $20,000 per mile (there being no rolling stock belonging thereto, as appears from Exhibit X), thereby imposing an arbitrary and oppressive penalty upon your orator for failing to pay the taxes aforesaid in gold, silver, United States Treasury notes, or national bank notes, after your orator had made the tenders of the coupons aforesaid.

Twelfth. And your orator further says, that copies of said re-assessments have been placed in the hands of said John Ed. Hamilton, Esq., treasurer of Augusta county, for levy; and your orator further says, that for the taxes due as aforesaid from the Valley Railroad Company the said John Ed. Hamilton, treasurer as
18 aforesaid, did, on the 22d day of March, 1883, *did* levy upon twenty-four of your orator's cars, then being at or near the station of the Valley Railroad Company, in the city of Staunton, and on the 23d day of March, 1883, in the city of Winchester, the said treasurer levied, for part of the taxes due from your orator as lessee as aforesaid, on twenty-two of your orator's cars, and on the 24th day of March, 1883, said treasurer made a like levy, for part of said taxes due from your orator as lessee of said railroads, on an engine and fifteeen cars at Harrisonburg, in said State; and your orator avers that the said treasurer will proceed to make further levies and to sell your orator's property for cash upon ten days' notice, as required by the laws of Virginia. As advised, your orator further says that the levy on your orator's cars in the city of Staunton was and is illegal and an outrage upon your orator's rights for which, the action of replevin having been abolished in Virginia (see Code, 1873, chap. 145, sec. 4), your orator is without remedy, there being no process of interpleader or other process by which your orator can protect its property from utter sacrifice and your orator from irreparable mischief.

In chapter 37, sections 3 & 4, Code 1873, will be found the law of Virginia as to levies or distraints for taxes, from which it will
19 be seen that the goods of the persons assessed can alone be distrained, unless there be a tenant or person in possession, whose goods may be distrained for "*taxes on land*," but even then not until the property of the landlord is exhausted, nor to an amount exceeding the rent contracted to be paid by such tenant. Your orator is not in possession of the Valley railroad, nor is your orator the tenant of the Valley Railroad Company. In fact, the only authority for levy as against personal property of a railroad company is to be found in said act, approved April 22d, 1882, section 20, (page 507 of acts of 1881, 1882), and that authority is found in these words: "The treasurer may distrain and sell any personal property of such company;" that is, his power to sell for default of the Valley Railroad Company is restricted to a sale of the Valley Railroad Company's property. Your orator avers that the action of the defendants, and especially of the defendant, John Ed. Hamilton, in seizing your orator's cars and engine is not only illegal and unauthorized, but that, to deprive your orator of said cars and engine, will cause your orator irreparable damage. Your orator is engaged in operating a railroad which is a great public highway, and one which large numbers of passengers and large amounts of
20 freight are being daily transported, and said cars and engine so seized and used by your orator in the transportation of such freight over the line of railroads so leased and operated by your orator as aforesaid, and also over your orator's other line of

railroads extended from Baltimore, Maryland, to Pittsburgh, Pennsylvania, and Chicago, Illinois.

These cars and engine are needed and absolutely required by your orator for the proper exercise by it of its franchises as a common public carrier, and for the performance of its duties to the public, and to deprive your orator of the daily use of such cars and engine will prevent it from properly performing its duties as such carrier, and from the proper exercise of its franchises as a public corporation, charged with a public duty, and that the amount of damage which your orator would suffer from the deprivation of the daily use of such cars and engine is not susceptible of accurate computation, but the same would be very large; and your orator avers that it is not practicable to obtain other cars and engine to take the place of those seized by the defendant Hamilton, until after the lapse of several months, owing to the fact that the car and locomotive manufacturing shops have orders ahead for a considerable period of time. Your orator further avers that the respondent,

21 John Ed. Hamilton, likewise has illegally and wrongfully levied in like manner on the property of other railroad corporations in the State of Virginia, seizing their cars and other property after such companies had made tender of the taxes due by them respectively in the tax-receivable coupons, for interest upon like bonds of the State of Virginia, and the said John Ed. Hamilton is wholly unable to pay the large damages which are claimed against and from him by reason of such seizures.

Your orator avers, on information and belief, that the said companies are about to institute legal proceedings against said Hamilton to recover said claims or to prevent him from enforcing the payment of said taxes by means of the sale of the property so levied, and any attempt to enforce the pecuniary claims of the respondent, arising from the illegal seizure of its property, and of the other railroad companies against said John Ed. Hamilton, arising in like manner, would be utterly without avail, as he could not possibly pay the claims so lawfully asserted against him, as the same are much in excess of the value of said defendants' estate.

Your orator is therefore remediless at law, and the said action of said defendants, as taken and threatened as aforesaid, will cause your orator irreparable injury.

22 Your orator further charges that said defendants are about to seize other cars and engines of your orator, and that they have actually for a time stopped the passenger trains of your orators, and threatened to seize the passenger cars and locomotive drawing the same, and they still continue to threaten seizure of other cars and locomotives of your orator, and to seize passenger cars, and interfere both with the passenger and freight traffic of your orator by such seizure for the payment of the taxes aforesaid, and your orator, in order to protect itself, will be compelled to institute a number of suits either against said defendants or said defendant Hamilton, or against the purchaser of the property so seized at any attempted sale of the same which may be made by the defendant; and your orator has no remedy save in a court of equity to thus

prevent a multiplicity of suits; the irreparable damage threatened to it and its business, and the gross fraud sought to be perpetrated upon it after it has tendered payment of the taxes aforesaid in the coupons made receivable for such taxes under an inviolable contract with the State of Virginia. Your orator further says that the said auditor of public accounts has wrongfully increased the several assessments aforesaid on the roadway and tract and other real estate from $15,000.00 per mile, as set forth in the original assessment thereof, made in the manner hereinbefore stated, to $20,000.00
23 per mile, in the manner hereinbefore recited.

And your orator has no remedy at law to set aside and vacate such unlawful increase in the assessment made as aforesaid, and the unlawful re-assessment made as aforesaid, but your orator is advised that it is within the peculiar power of a court of equity to require said defendant, the auditor of public accounts, to set aside and annul the re-assessment aforesaid.

Your orator further charges that the taxes levied upon the basis of the said increased assessment are a lien upon the real estate and railroads so leased and operated by your orator, and create a cloud upon the title of your orator thereto, and upon the title of the said several companies who are the lessors thereof, and such re-assessment and levy of taxes on the basis thereof creates an apparent incumbrance upon said railroads and real estate, and a cloud upon the title thereto, especially as the records of said auditor of public accounts show that said companies and also your orator, as the lessee thereof, failed to pay the tax assessed upon the property thereof upon the basis of the said original assessment, whereas, in truth and in fact, your orator had tendered full payment of the said taxes, as hereinbefore particularly recited, and the same had been refused.

24 That the refusal hereinbefore mentioned to accept and receive payments into the treasury of the State of the money and coupons hereinbefore referred to was, as your orator is informed, believes, and charges, made under and in consequence of an act of the General Assembly of the State of Virginia, entitled "An act to provide for the more sufficient collection of the revenue to support the Government, maintain the public schools, and to pay interest on the public debt," approved January 26th, 1882, which act your orator prays leave to refer with the like effect as if the same were herein fully and at large set forth.

But your orator insists and claims that the said act, so far as the same presents the acceptance of or authorizes the refusal to receive the said coupons in payment of such tax, or takes away any rights or remedies to which the bondholder or coupon-holder was entitled at the time of the passage of such act, and the issue of the bonds and coupons thereunder impairs the obligation of the contract under the said act of March 30th, 1871, between the said State and the holders of bonds and coupons issued under the said act.

Your orator calls special attention to the provision of said act of January 26, 1882; that under said act your orator had no power to

pay in cash under protest the taxes levied upon the basis of
25 said original assessment, and recover the same from the officer
receiving such taxes. Said act, it will be seen, requires the officer charged by law with the collection of revenue due the State to first take some steps for the collection of the same before any citizen or taxpayer can pay his taxes in cash under protest, and have benefit of said act; and your orator could not, under said act, tender the tax-receivable coupons as aforesaid in payment of taxes, and then, under protest, pay said taxes in cash, and then sue to recover the same; but your orator is compelled by said act to wait until a collector of revenue takes some steps for the collection of said taxes; and under the said tax act of April 22d, 1882, and section 20 thereof, the only steps which must be first taken is to raise the assessment against said companies' property from $15,000.00 per mile to $20,000.00 per mile, and thus impose a penalty amounting to 33⅓ per cent. of the entire amount of taxes levied, followed by a distraint for same; and your orator would be compelled to pay a heavy penalty without being permitted to pay the amount of taxes due from said companies as aforesaid.

The State of Virginia, by the act of January 26th, 1882, aforesaid, has absolutely taken away from your orator the right to tender said tax-receivable coupons in payment of the taxes levied as afore-
26 said, and has also taken away the right after the tender of coupons to them [to] pay the taxes claimed in cash and sue to recover the same, but requires your orator to wait until the auditor of public accounts has raised the assessment to twenty thousand dollars a mile, and thereby imposed a penalty of 33⅓ per cent. of the amount of the taxes claimed. Such legislation, your orator is advised, destroys entirely the right to tender the coupons for taxes levied upon the original assessed value, without giving any substitute or adequate remedy for the payment of the taxes levied upon said first assessment value under protest, with suit to recover the same when so paid.

Your orator is, therefore, remediless at law, and has no means at law to protect its rights or its tender of the tax-receivable coupons aforesaid. Whereupon, inasmuch as your orator is remediless by the strict rules of this common law, it prays that it may be adjudged and decreed by this honorable court that the tax assessed by the said board of public works upon the real and personal property of your orator, as hereinbefore set forth, and upon the property of the Valley Railroad Company, has been and is by such tender of the money and coupons, and bringing the same into court in this
27 suit paid, satisfied, and discharged, and that the so-called assessment, made under the direction of the auditor of public accounts, and the attempted levy of the tax thereunder, and all acts in respect thereto, were and are wholly null and void, and that such assessment be set aside and vacated, and that the defendants and each of them, their, and each of their successors, agents, attorneys, & servants, be perpetually enjoined and restrained from taking any steps or proceedings for or towards to collection of any of the taxes or alleged taxes hereinbefore referred to, or destraining or maintain-

ing any distress upon or selling any property of such company therefor, and that your orator may have such other and further relief in the premises as may be just and equitable; and in the mean time, until the hearing and determination of this suit, that the defendants, and each of them, their, and each of their successors, agents, attorneys, and servants, be stayed, enjoined, and restrained from taking any steps or proceedings for or towards the collection of any of the taxes or alleged taxes hereinbefore referred to, or destraining or maintaining any distress upon or selling any property of such company therefor. May it please the court also to grant unto your orator a writ of subpœna, to be issued out of and under the seal of this honorable court, to the said S. Brown Allen, auditor of public accounts; David R. Revely, treasurer of the State of Virginia, and John Ed. Hamilton, treasurer of Augusta county, in the State of Virginia, commanding them and each of them, at a day and under a penalty therein to be inserted, personally to be and appear before this honorable court, and then and there to answer the premises, and to stand and abide by and perform such order, direction, and decree, as shall be made therein.

28

THE BALTIMORE AND OHIO RAILROAD COMPANY.

By SAMUEL SPENCER,
Second Vice-President.

H. W. SHEFFEY &
JOHN K. COWEN,
Of Counsel for Compl't.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this twenty-fourth day of March, in the year eighteen hundred and eighty-three, before the subscriber, a commissioner of the circuit court of the United States for the district of Maryland, personally appeared Samuel Spencer, the second vice-president of the Baltimore and Ohio railroad, the complainant in the foregoing bill of complaint, and for and on behalf of said complainant made oath, in due form of law, that he has read the same, and that the allegations therein made are true, to the best of his knowledge, information, and belief, and that the statements therein made of his own knowledge are true, and those made upon information of others he believes to be true, and at the same time subscribed the same.

29

In testimony whereof, I have hereunto set my hand and official seal on the date above written.

[SEAL.] GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

The following are copies of the exhibits filed with the above bill, and are in the words and figures here following, to wit:

30 EXHIBIT "X2."

$703.72. COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, *March 16th*, 1883.

Received of the Winchester and Potomac Railroad Company seven hundred and three dollars 72 cents, on account of the tax on real and personal property for 1882.

WM. R. SMITH, *Clerk.*

To the TREASURER OF THE COMMONWEALTH OF VIRGINIA.

CASHIER OF THE MERCHANTS' NAT'L BANK:

Receive the within-mentioned sum, and place the same to the credit of the treasurer of the Commonwealth of Virginia.

Merchants' Nat'l Bank. J. M. TAYLOR.

[Endorsed across the face:] Treasurer's office of Virginia, March 16, 1883. Richmond.

Payment of the within-mentioned sum has this day been tendered by Hugh W. Shiffey, attorney for the within-named road and Balto. & O. R. R. Co., and J. W. Davis, assistant to 1st vice-pres. B. & Ohio R. R. Co., in coupons, and silver coin for fractions, as per memorandum attested by me, and said tender was refused by me, M'ch 16th, 1883. J. F. GLENN, *Cas.*

[Endorsed across the face:] Treasurer's office of Virginia, Mar. 16, 1883. Richmond.

31 EXHIBIT "X3."

$1,144.00. COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, *March 16th*, 1883.

Received of the Winchester and Strasburg Railroad Company eleven hundred and forty-four dollars, on account of the tax on real and personal property for 1882.

WM. R. SMITH, *Clerk.*

To the TREASURER OF THE COMMONWEALTH OF VIRGINIA.

CASHIER OF THE MERCHANTS' NATIONAL BANK:

Receive the within-mentioned sum and place the same to the credit of the treasurer of the Commonwealth of Virginia.

J. M. TAYLOR.

[Endorsed across the force:] Treasur-'s office of Virginia, March 16, 1883. Virginia.

Payment of the within-mentioned sum has this day been tendered to Hugh W. Sheffey, attorney for the within-named railroad company and B. & O. R. R. Co., and J. W. Davis, assistant to

1st vice-pres. B. & O. R. R., in coupons, and silver coin for fractions, as per memorandum attested by me, and said tender was refused by me, March 16, 1883.

J. F. GLENN, *Cash.*

[Endorsed across face:] Treasurer's office of Virginia, March 16th, 1883. Virginia.

32 EXHIBIT "X⁴."

$2,970.40. COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, *March 16th*, 1883.

Received of the Strasburg and Harrisonburg Railroad Company twenty-nine hundred and seventy dollars forty cents, on account of the tax on real and personal property for 1882.

WM. R. SMITH, *Clerk.*

To the TREASURER OF THE COMMONWEALTH OF VIRGINIA.

CASHIER OF THE MERCHANTS' NAT'L BANK:

Receive the within-mentioned sum, and place the same to the credit of the treasurer of the Commonwealth of Virginia.

J. M. TAYLOR.

[Endorsed across the face:] Treasur-'s office of Virginia, Mar. 16th, 1883. Richmond.

Payment of the within-mentioned sum has this day been tendered by Hugh W. Sheffey, attorney for the within-named railroad and B. & O. R. R. Co. and J. W. Davis, assistant to 1st vice-pres. B. & Ohio R. R. Co., in coupons, and silver coin for fractions, as per memorandum attested by me, and said tender was refused by me, M'ch 16th, 1883.

J. F. GLENN, *Cas.*

[Endorsed across the face:] Treasur-'s office, March 16. 1883. Richmond.

33 EXHIBIT "5."

$1,571.00. COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, *March 16th*, 1883.

Receive- of the Valley Railroad Company one thousand five hundred and seventy-one dollars, on account of the tax on real and personal property for 1882.

WM. R. SMITH, *Clerk.*

To the TREASURER OF THE COMMONWEALTH OF VIRGINIA.

CASHIER OF THE MERCHANTS' NAT'L BANK.

Receive the within-mentioned sum, and place the same to the credit of the treasurer of the Commonwealth of Virginia.

J. M. TAYLOR.

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[Endorsed across the face:] Treasurer's office of Virginia, Mar. 16, 1883. Richmond.

Payment of the within-mentioned sum has this day been tendered by Hugh W. Sheffey, attorney for the Valley Railroad Co, in coupons, and silver coin for fractions, as per memorandum attested by me, and said tender was refused by me, March 16th, 1883.

J. F. GLENN, *Cash.*

[Endorsed across the face:] Treasurer's office of Virginia, Mar. 16, 1883. Richmond.

34 EXHIBIT "6."

$22.04. COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, *March 16th*, 1883.

Receive- of the Valley Railroad Company twenty-two dollars four cents, on account of the tax on income for 1882.

WM. R. SMITH, *Clerk.*

To the TREASURER OF THE COMMONWEALEH OF VIRGINIA.

CASHIER OF THE MERCHANTS' NAT'L BANK.

Receive the within-mentioned sum, and place the same to the credit of the treasurer of the Commonwealth of Virginia.

J. M. TAYLOR.

[Endorsed across the face:] Treasurer's office of Virginia, Mar. 16, 1883. Richmond.

Payment of the within-mentioned sum has this day been tendered by Hugh W. Sheffey, attorney for the Valley Railroad Company, in coupons, and silver coin for fractions, as per memorandum attested by me, and said tender was refused by me, Maroh 16, 1883.

J. F. GLENN, *Cashier.*

[Endorsed across the face:] Treasurer's office of Virginia, March 16, 1883. Richmond.

36 EXHIBIT "7" X.

The undersigned, in payment of the taxes imposed by law upon the railroad companies hereinafter named, under sections 20 and 21 of the act, entitled An act for the assessment of taxes on persons, property, incomes, and licenses, and imposing taxes thereon for the support of the Government and free schools, and to pay the interest on the public debt, approved April 22d, 1882, make tender of tax-receivable coupons and lawful money as follows:

For the Valley Railroad Company:

Amount of tax imposed on property	$1,571 00
Net income	22 04
	$1,593 04

Amount of tender as follows, to wit:

Fifty-three (53) coupons, due July 1, 1882, each for $30, said coupons being coupons, each numbered 22, upon bonds numbered as follows: 4049, 4047, 4048, 2465, 2466, 4035, 4046, 9876, 12581, 17942, 15804, 14426, 3640, 5669, 6480, 3689, 18234, 11055, 4078, 13848, 15533, 7602, 810, 10453, 16989, 7428, 7974, 7427, 12717, 12721, 12722, 12718, 12723, 12716, 12719, 748, 749, 12720, 12354, 8232, 12692, 10367, 16921, 1542, 674, 675, 676, 14367, 17182, 16588, 7952, 6233, 6232	$1,590 00
One coupon, due July 1, 1881, for $3.00, numbered 20, upon bond numbered 638	3 00
Silver	10
	$1,593 10

37 For the Winchester and Potomac Railroad Company:

Amount of tax imposed	$703 72

Amount of tender as follows, to wit:

Twenty-seven (27) coupons, due Jan'y 1, 1882, each for fifteen (15) dollars Said coupons being coupons, each numbered 21, upon bonds numbered as follows, viz: 130, 920, 858, 55, 54, 57, 56, 616, 1489, 2062, 2227, 1882, 1841, 1801, 1610, 974, 1424, 1138, 1091, 1071, 1070, 2348, 367, 131, 636, 713, 730.	405 00
Two coupons, due July 1, 1881, each for $15, numbered 20, upon bonds numbered 2062, 2241	30 00
Eight coupons (8), due July 1, 1882, each for $15 Said coupons being coupons, each numbered 22, upon bonds numbered as follows, viz: 375, 64, 1980, 1934, 1738, 508, 1489, 1935.	120 00
Thirty-one (31) coupons, due July 1, 1882, each for (3) three dollars Said coupons being coupons, each numbered 22, upon bonds numbered as follows, viz: 826, 303, 304, 825, 827, 4477, 6994, 4476, 1487, 1484, 1485, 2016, 1663, 1662, 1125, 1123, 1122, 1124, 1121, 1120, 709, 703, 708, 701, 702, 756, 558, 560, 559, 1668, 2890.	93 00
Seventeen (17) coupons, due Jan'y 1, 1882, each for three (3) dollars Said coupons being coupons, each numbered 21, upon bonds numbered as follows, viz: 560, 559, 304, 825, 827, 3243, 3240, 1887, 4531, 808, 810, 811, 809, 556, 1668, 2890, 1189.	51 00
	$699 00

38	Bro't forward amount of tax		$703 72
	" " tender		699 00
	One coupon, due July 1, 1881, for three (3) dollars, num-		
	20, upon bond numbered 189		3 00
	Silver		1 75
			$703 75
	For Winchester & Strasburg Railroad Company:		
	Amount of tax imposed		$1,144 00
	Amount of tender as follows, to wit:		
	Sixteen (16) coupons due Jan'y 1, 1882, each for $30		480 00
	Said coupons being coupons, each numbered 21, upon bonds numbered as follows, viz: 2465, 2466, 6649, 2827, 2828, 4893, 4440, 5933, 4860, 7606, 9829, 9831, 4855, 7845, 9741, 4857.		
	One coupon for $3.00 due July 1, 1881, numbered 20, upon bond numbered 1668		3 00
	Eighteen (18) coupons due July 1, 1882, each for $30		540 00
	Said coupons being coupons, each numbered 22, upon bonds numbered as follows, viz: 6231, 14486, 14831, 9793, 2729, 8842, 2803, 2804, 2062, 4305, 1164, 4441, 4720, 10421, 2696, 3253, 3215, 9792.		
	Four coupons due July 1, 1881, each for thirty (30) dollars		120 00
	Said coupons being coupons, each numbered 20, upon bonds numbered as follows, viz: 9201, 9202, 9918, 10024.		
	Silver		1 00
			$1,144 00
39	For Strasburg and Harrisonburg Railroad Company:		
	Amount of tax imposed		$2,970 40
	Amount of tender as follows, to wit:		
	Ninety-nine (99) coupons due Jan'y 1, 1882, each for thirty (30) dollars		$2,970 00
	Said coupons being coupons, each numbered 21, upon bonds as follows, viz: 12330, 7340, 9501, 12679, 10805, 12681, 7142, 13848, 12692, 4078, 11055, 15533, 12678, 12879, 3645, 16414, 8007, 17112, 5937, 5935, 5936, 5934, 12677, 12680, 4817, 10281, 749, 748, 1542, 2728, 4854, 2580, 680, 4859, 2582, 9038, 3584, 4856, 4855, 4858, 10922, 13522, 5118, 12656, 13488, 1090, 1091, 4861, 6317, 6245, 8190, 9128, 12456, 9830, 4816, 5897, 8955, 17179, 10024, 18057, 18058, 17846, 9918, 9202, 17667, 5412, 5413, 17671, 16637, 17722, 13922, 18014, 18013,		

18012, 10421, 18011, 12243, 17447, 4836, 4837, 7828, 7830, 7829, 7831, 13611, 17286, 13606, 9246, 8924, 8968, 6531, 5670, 4302, 3843, 18146, 7860, 9201, 18148, 7625.

Silver	40
	$2,970 40

The roads of the Winchester and Potomac Railroad Company, the Winchester and Strasburg Railroad Company, and the Strasburg & Harrisonburg Railroad Company, aforesaid—the latter, being part of the road of the Mannassas Gap Railroad Company, being held and operated by the Baltimore and Ohio Railroad Company, as lessee, and said tender is made on behalf of said companies, respectively, by the Baltimore and Ohio Railroad Company as such lessee.

40 Given under our hands, this sixteenth day of March, eighteen hundred and eighty-three.

HUGH W. SHEFFEY,

Counsel for all and each of said Companies and for the Balto. & Ohio Rail Road Co.

JOHN W. DAVIS,

Assistant to 1st V. President, Balto. & Ohio R. R. Co.

Summary of Tenders.

1. For Valley Railroad Company coupons		$1,593 00
Coin		10
		$1,593 10
	$1,571 00	
	22 00	
	1,593 00	
2. For Winchester & Potomac Rail Road Company coupons		$702 00
Coin		1 75
		$703 75
3. For Winchester & Strasburg Rail Road Company coupons		1,143 00
Silver coin		1 00
		$1,144 00
4. For Strasburg & Harrisonburg Rail Road Company coupons		2,970 00
Silver coin		40
		$2,970 40

Tenders of coupons and silver coin for fractions were this day made to me, as cashier of The Merchants' National Bank, in accord-

ance with the foregoing detailed statements of Mess. Sheffey and Davis, and refused by me, as shown by my endorsements on the respective warrants, to pay the said several sums of money into this bank as a State depository.

March 16th, 1883.

J. F. GLENN, *Cashier.*

41 We, the undersigned, do hereby certify that after making the tender evidenced by the paper hereto annexed, and marked "X," we made a like tender at the office of the treasurer of the Commonwealth of Virginia to ——— Taylor, acting treasurer of the Commonwealth, Mr. Riveley, the treasurer of the Commonwealth, being absent, who refused to receive the coupons and fractional silver coin so tendered in payment of the respective amounts due the Commonwealth; and thereupon on the same day, to wit, the sixteenth day of March, eighteen hundred and eighty-three, we made a like tender in the office of the auditor of public accounts of the Commonwealth of Virginia to Wm. R. Smith, chief clerk, in said office, and representing the auditor of public accounts; S. Brown Allen, Esquire, who was absent, and said tender was refused by said Wm. R. Smith under instructions from the said auditor of public accounts.

Given under our hands, this sixteenth day of March, eighteen hundred and eighty-three.

HUGH W. SHEFFEY,
Counsel for all and each of the Companies named in paper "X," & for the Balto. & Ohio R. R. Co.
JOHN W. DAVIS,
Assistant to 1st V.-President Balto. & Ohio R. R. Co.

42 The following is a true copy of two of said coupons named in said bill of complaint, and are here set forth in accordance with the agreement signed and filed by the parties in this cause:

Receivable at and after maturity for all taxes, debts, and demands due the State.

The Commonwealth of Virginia will pay the bearer thirty dollars.

Interest due 1st July, 1882. Coupon No. 22. On bond No. 4047.

GEO. RYE,
Treasurer of the Commonwealth of Virginia.

Receivable at and after maturity for all taxes,
22
debts, and demands due the State.

43 Receivable at and after maturity for all taxes, debts, and demands due the State.

The Commonwealth of Virginia will pay the bearer thirty dollars.

Interest due 1st July, 1882. Coupon No. 22. On bond No. 4049.

GEO. RYE,
Treasurer of the Commonwealth of Virginia.

Receivable at and after maturity for all taxes,
22
debts, and demands due the State.

44 And at another day, to wit, on the 7th day of June, in the year of our Lord one thousand eight hundred and eighty-three, by direction of counsel for complainant, the following process issued in this cause, which is in the words and figures here following, to wit:

UNITED STATES OF AMERICA, *Western District of Virginia:*

The President of the United States of America to S. Brown Allen, auditor of public accounts, D. R. Reveley, treasurer of Va., and John Ed. Hamilton, treasurer of Augusta county, Va.:

We command you, and every one of you, that you appear before our judges of our circuit court of the United States of America for the western district of Virginia, at the clerk's office in Harrisonburg, in said district on the first Monday in the month of July next to answer the bill of complaint of the Baltimore and Ohio Railroad Company, this day filed in the clerk's office of said court in equity, then and there to receive and abide by such judgement and decree, as shall then or thereafter be made, upon pain of judgement being pronounced against you by default.

To the marshal of the western district of Virginia to execute.

45 Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Harrisonburg, this 7th day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the 107 year.

[SEAL.] W. B. LURTY, *Clerk.*

An injunction is awarded restraining S. Brown Allen, auditor of Virginia, D. R. Reveley, treasurer of Virginia, and John Ed. Hamilton, treasurer of Augusta county, Va., their agents or attorneys, from taking any steps or proceedings for or towards the collection of any of the taxes, or distraining or maintaining any distress upon, or selling any property of the Baltimore and Ohio Railroad Company mentioned in this suit until the further order of this court.

[SEAL.] Test: W. B. LURTY, *Clerk.*

Executed the within subpœna and *in* injunction notice by a true copy of the within on S. Brown Allen, auditor of Virginia, D. R. Reveley, treasurer of Virginia, and John Ed. Hamilton, treasurer of Augusta Co., Virginia.

June 19th, 1883.

JOHN G. WATTS,
U. S. Marshal.
By A. J. WALL, *Deputy.*

46 The following is the answer filed in this cause, and is in the words and figures here following, to wit:

47 In the Circuit Court of the United States for the Western District of Virginia.

To the Honorables Hugh L. Bond and R. W. Hughes, judges:

The joint and several demurrers and answers of S. Brown Allen, auditor of public accounts of Virginia; David R. Reveley, treasurer of said State; and John E. Hamilton, treasurer of Augusta county, Virginia, to a bill of injunction exhibited in your honorable court against them by the Baltimore and Ohio Railroad Company.

1st. By way of demurrer to said bill, respondents come and say that the said bill is insufficient in law for the relief prayed for therein.

2nd. But without in any way waiving the many errors, irregularities, and imperfections in said bill, but insisting thereon, by way of answer thereto, or so much thereof as they are advised it is material for them to answer, answering, they say that they enter their general traverse and denial of all the allegations of said bill,

48 except in so far as they may be hereinafter admitted.

Respondents admit the Baltimore and Ohio Railroad Company is a corporation created by the State of Maryland, as to its main trunk; that S. Brown Allen is the auditor of public accounts of the State of Virginia, D. R. Reveley is the treasurer thereof, and John Ed. Hamilton is the treasurer of Augusta county, in said State; that the Winchester and Potomac, Winchester and Strasburg, and Strasburg and Harrisonburg Railroad Companies are now and have been for some years past run and operated by the Baltimore and Ohio railroad, the complainant in said bill.

The funding act of Virginia of 1870–'1 is in the main correctly recited in said bill, so far as the tax-receivable coupons are described; that the act of 1881–'2, approved April 22nd, 1882, sections 20–1, touching the taxation of railroad property, is the act under which respondents acted in this case; that the action of the board of public works of Virginia, on the 22nd of November, 1882, in the assessment of said railroad property, and also the amounts of the assessments

49 against the said several railroads and the basis of value upon which the said assessments were made, are believed to be correct; that no doubt the complainants, as averred through Messrs. Sheffy and Davis, on behalf of the Baltimore and Ohio Railroad, presented by John F. Glenn, cashier of the Merchant's National Bank, a State depository, and to the auditor and treasurer aforenamed, the coupons, scheduled and exhibited with the said bill, and each and all of them, did refuse to receive them in payment of the said taxes; that the amount of the Valley railroad assessment is correct, and doubtless the coupons named were presented to the officers of the company in payment of the taxes due by it. It is further true that the respondent, the auditor, has assessed each of the four roads named, at the rate of $20,000 per mile, and on the basis of forty cents on the one hundred dollars of said valuation; it is also true that the assessments upon the said roads were placed by said

auditor in the hands of said Hamilton, as treasurer, under the
50 act of 22nd April, 1882, section 20–1, and that the said respondent, Hamilton, has levied upon the engines and cars named in said bill, and he has advertised the same for sale, and he will sell them for the said taxes, unless they are paid, or unless respondents are prohibited by the order of your honorable court.

And now, having admitted the foregoing matters, respondents again interpose their general and specific traverse and denial of all the other averments and allegations of facts, and the inferences of law contained in said bill, and call on complainant for strict proof. They deny that said B. and O. R. R. Co. is a citizen of Maryland.

The facts of this case are these: The Baltimore and Ohio Railroad Company have for some years past owned and operated, as a part of its line, the following branch roads: The Winchester and Potomac road; 2, the Winchester and Strasburg road; 3, the Strasburg and Harrisonburg road; 4, the Valley road: giving it a continuous line from its main stem from Winchester to Staunton by the branch lines just named, and which said four branch lines are wholly
51 in the State of Virginia. They were incorporated by Virginia law, organized as bodies politic in Virginia, and are subject to the ordinary tax laws of this State.

The said companies are so entirely under one management that the annual report for each of them to the auditor, required by act of April 22nd, 1881–2, sections 20 and 21, are made out by W. H. Ijams, the treasurer of the Baltimore and Ohio railroad, and all of the said annual reports are sworn to by the said treasurer, as will be seen from the copies of the said railroad company's reports herewith filed, marked "Extract A," which are asked to be taken and considered as a part of this answer, as also the other exhibits hereinafter named.

The complainants, the Baltimore and Ohio railroad, have been operating these roads for — years past, reporting their condition, their earnings, expenditures, rolling-stock, operations, names of their officers, and general financial statement, and, as before stated, these reports were made and verified by the said treasurer of the Baltimore and Ohio railroad.

52 Respondents further say that such is the corporate identity of these companies, and such the ownership, management, and control of the said four companies by the Baltimore and Ohio Railroad Company, that the officers of the one are the officers of the other in many instances; that Samuel Spencer, the third vice-president of the Baltimore and Ohio railroad, is the president of the Valley railroad, as also a director thereof, elected as late as November 10, 1881; that W. H. Ijams is the treasurer and acting secretary of the Baltimore and Ohio railroad, and at the same time the treasurer and acting secretary of the Valley railroad; that James W. Davis, who, incompany with Judge Sheffey, made the pretended tender for the taxes heretofore named, is the assistant to the first vice-president to the Baltimore and Ohio railroad, and at the same time is road master of the Valley railroad, and the Baltimore and Ohio Railroad Company have as complete control, by some force of con-

tract or arrangement (which is wholly immaterial to the purposes of this case), of the said Winchester and Potomac,
53 Winchester and Strasburg, Strasburg and Harrisonburg, and the Valley railroads, as any landlord or owner of property could possibly have over lands or personals committed to the care of managers or operatives; that for some years past the Baltimore and Ohio railroad has been recognized and treated as the parties responsible to the State of Virginia for taxes, which they have paid through their treasurer to the State, and in other ways have recognized their liability, and held themselver out to the world and to the State as liable for said taxes. Therefore respondents say that the Baltimore and Ohio company are estopped now to deny their liability for these taxes, even if the rolling-stock levied upon for them be their property; and it would be unjust and inequitable for the State of Virginia to allow their complaint of illegality of assessment or levy. Your respondents, further answering, say that under the act approved 22nd of April, 1882, which is chapter 119, acts of 1881–'2, page 506, sections 20–1, every railroad company in
54 Virginia, not exempt from taxation, is required to report annually, on the 1st of June, to the auditor of public accounts, all of its real and personal property of every description, as of the 1st of February of each year, including its roadway and tracks, depot and shops, rolling-stock, and all other property; this report to be verified by the oath of the president or other officer; that upon this report the auditor is required to lay the same before the board of public works of the State, which shall, after thirty days' — to the president or other proper officer of said company, proceed to ascertain and assess the value of said railroad property upon the best and most reliable information that can be procured, including the power to send for persons and papers; that when the assessment is made, a certified copy of the same is to be immediately forwarded by said board to said railroad company so assessed, and then it becomes the duty of the said company to pay into the treasury of the State, within sixty days after the receipt thereof,
55 the tax which is imposed thereon by law and which, by the twenty-first section of the said *said* act, is fixed at forty cents on the one hundred dollars of said ascertained assessed value. For the purpose of enforcing this statute, and to compel said railroad companies to so report said property, and pay the tax imposed thereon, a penalty is prescribed to this effect; that in the event of such failure, the auditor of public accounts shall immediately assess said company, at the valuation of twenty thousand dollars per mile, at said rate of forty cents on the one hundred dollars thereof, and said tax shall be levied and collected by any treasurer to whom the auditor may deliver such assessment or a copy thereof, said treasurer being authorized by the statute to distrain and sell any personal property of such company for such taxes. It was under this authority that the board of public works assembled and assessed the taxes against the four said roads hereinbefore named, and which assessment was based upon the several re-
56 ports heretofore exhibited, and dated the 7th of August, 1882,

and furnished by W. H. Ijams, treasurer of the Baltimore and Ohio Railroad Company, as well as of the other companies; the said board of public works met on the 22nd day of November, 1882, and immediately thereafter copies of said assessment were forwarded to said companies for the payment of their taxes. As before stated, this assessment was fixed at fifteen thousand dollars per mile, and had the companies complied with the law, as was their duty, this sum would have been the basis of their taxation by the State, but said companies failed to comply with the law within the time prescribed by law, and have not yet complied, and therefore the penalty was imposed on these derelicts by rating their property at twenty thousand dollars per mile, and the said auditor proceeded to place these assessments in the hands of John Ed. Hamilton, treas-
57 urer of Augusta county, for levy and collection, who proceeded to levy the same upon the property before mentioned, and has advertised the same in the manner before stated.

Respondents aver that in this matter they dealt with this coupon as the law demanded and prescribes for all tax-payers who refuse to pay these taxes that are imposed upon them by the State government.

Respondent avers that the property levied upon was found in the possession of the respective companies from which the taxes were due, and it was the rolling-stock of railroads operated in Virginia, and was attached to, connected with, and partook of the same nature as the other property of said respective companies. It was connected with and devoted to the purpose and usage of said companies; it was found on the tracks of said companies, and therefore its *situs* and domicile were in Virginia, where the weight of authority de-
declares that they are liable to be taxed as a part of the roads,
58 and should be treated as the property of the company for all purposes of taxation.

Any other view of this case would license these railroad companies to enjoy all the rights and franchises of public carriers, and yet, by a species of circumvention would deprive the State of her legitimate revenues.

So that respondents insist: First, that the property levied upon was to all legal intents and purposes the property of the companies that owed the taxes, and liable therefor; or, second, if this be not the fact, and the property be that of the Baltimore and Ohio Railroad Company, still, under the circumstances of the management, control, and operation of said divisional roads by the Baltimore and Ohio Company, the property is equally liable for said taxes.

Respondents beg to call the attention of the court to the fact that nowhere in the bill is there an express denial of ownership of said levied property in the Valley Railroad Company, but the whole bill in this regard seems to be a studied evasion of this material point.

59 Respondents deny that the said companies did not receive certified copies of their respective assessments from the board of public works, and that they were not immediately forwarded to

said companies after said assessments on the 22d day of November, 1882.

Respondents further deny most positively any payment of said taxes, or any legal tender of them, in the mode prescribed for the payment of taxes in coupons, for neither the auditor or treasurer or cashier of the Merchants' National Bank of Richmond, singly or together, had any power to accept coupons in payment of taxes; and fearing that the complainants have not thoroughly comprehended the reason of respondents and the bank for their refusal of the coupons—

Respondents, further answering, say that by an act of the General Assembly, approved January 14, 1882, chapter 7, page 10, acts of 1881–'2, it was prescribed and enacted that, to prevent frauds
60 upon the Commonwealth and holders of her securities in the disbursement of revenue, before any tax-payer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the Commonwealth any papers or instrument in print, writing, or engraving purporting to be coupons detached from the bonds of the Commonwealth issued under the act of 1871, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering them a receipt, stating that he has received the same for the purpose of identification and verification. The act further requires that the tax-payer at the same time shall pay his taxes in coin, legal-tender notes, or national bank bills, and upon the payment thereof the collector or receiver of taxes shall give him a receipt for the same; and the act in express terms further declares
61 that in case of refusal by the tax-payer to payin coin, legal-tender notes, or national bank bills, the taxes due shall be collected as all other delinquent taxes are collected. It further provides that the coupons so received from the tax-payers shall be marked with the initials of his name on the same, and, being securely sealed up, shall be delivered to the judge of the county court or hustings court of the city; and the mode of proceedure is defined in detail, which, in brief, requires that every tax-payer shall, by the verdict of a jury impanelled in said courts, prove, identify, verify, and establish such coupons to be genuine and legally receivable for taxes. And it is only when the judgment of the court aforesaid, in conformity to such verdict, that the coupons are genuine and legally receivable for taxes is certified to the treasurer, that he has any rights at all to receive said coupons for taxes. He then must receive said coupons and refund to the tax-payer the money which he has before paid for his taxes. This act was
62 passed because the country was flooded with spurious, stolen, or forged bonds and coupons made in the similitude of genuine ones, and to protect the revenues of the State as well as the *bona fide* bondholders, and for the purpose of enforcing the contract created between the Commonwealth and her creditors by the pending act of 1870–'71.

Respondent further says that the pretended tender, by Messrs.

Sheffly and Davis, of the taxes due by the said four roads was in no-
wise a compliance with the coupon act of the 14th of January, 1882,
because the coupons offered by them had not been verified and ascer-
tained to be genuine by the verdict of a jury and the judgment of a
court, and so certified to the State treasurer; nor did they pay or
offer to pay the said taxes in coin, legal-tender notes, or national
bank bills, and it was for these very reasons that respondents, the
auditor and treasurer, and Mr. Glenn, the cashier of the State
63 depository aforesaid, refused to accept these unverified and
unproven coupons. In response to the offer of production,
by complainant of his coupons aforesaid to this honorable court,
respondents can only reply that the law has designated the county
and hustings courts as the proper tribunals to establish the verity
of coupons.

Respondents further answer that this act of the Virginia Legisla-
ture has undergone the severest judicial investigation in the su-
preme court of appeals of Virginia and in the Supreme Court of
the United States, and has been declared by both of those tribunals
to be valid and constitutional. and, without imputing any motives
to complainant, respondents unhesitatingly aver that, if successful,
the effect of complainants' bill would be to circumvent, annul, and
reverse the decision of said Supreme, State, and Federal courts in
the recent case of Antoni *vs.* Greenhow, wherein the very question
of the receivability of coupons for taxes of the very class embraced
in the bill, before they were established by a jury to be
64 genuine, was brought directly in issue and decided adversely
to the claims contended for in said bill. Respondents here-
with file as a part of this answer the Commonwealth's argument
in said case in the Supreme Court of the United States, as also the
record in said case, from which it will be seen that this question is
res adjudicata.

Respondents deny that the said railroad companies had no time,
after the receipt of the assessment forwarded them by the board of
public works, within which to verify the said coupons and qualify
them as legally tax-receivable for receipt by the treasurer. The
simple reply is that the county and hustings courts sit monthly in
every county and city in the Commonwealth. The board of public
works assessed the railroads on the 22d of November, 1882, and the
complainant could have easily, within sixty days, required by law
for the payment of taxes by railroads, after the assessment or
65 notice thereof, have established their coupons to be genuine,
if they were such, by the speedy and economic remedy pro-
vided by the said act.

It is true, as stated in the bill, that section 7 of chapter 43 of
the Code describes the manner of paying the taxes into the State
treasury by the warrant of the auditor on the treasurer, and the
treasurer's endorsement on the warrant to the bank depository to
receive the money; but this is subject to the requirements prescribed
by the said coupon act of January, 1882, where the taxes are sought
to be paid in coupons.

Respondents deny the averment of the bill that $20,000 penalty

is arbitrary and oppressive. They say that it is authorized and directed by section 20 of acts of 1881–'82, chapter 119, p. 306, and has often been declared by our highest courts to be valid and constitutional. Why the complainant speak of it as oppressive, and the levy as an "outrage," can only be accounted for, for the reason
66 that taxes to Government are generally grudgingly paid.

Respondents deny the right of complainant, by injunction, to arrest the Commonwealth of Virginia in the collection of her taxes; they deny that complainants have no legal remedy for any grievance they may suffer by reason of said assessments and levies.

They have several plain, adequate, and complete remedies at law, if entitled to redress in the foregoing record. Injunction will not lie to restrain the commission of a pure, simple, and naked trespass, as is the case here, if any wrong at all has been done by the respondents, for, if an officer holding a tax assessment for the collection of taxes assessed against one man, levies said assessment on the property of another man, the latter has his remedy by action against the officer for damages. The complainants seem to have been aware of this doctrine, and therefore they have sought to bring this case
67 within some of the other branches that attach jurisdiction, in the collection of taxation, to courts of equity. They have charged that the said assessments and levies amount to a fraud on complainants, cast a cloud on the title to the property, as well as an incumbrance thereon, and that the sale would produce irreparable damages to said railroad property.

Respondents wholly deny each and all of said allegations.

There was no fraud, unless it be fraudulent for a State to make her tax-payer pay her dues. There was no cloud on the title created, unless the lien of a valid legal tax ticket or assessment casts a cloud on the title of a tax-payer, and there will be no irreparable damages from said sale other than that that ensues from the sale of the property of a tax-payer who refuses to pay his taxes, and each of these propositions respondents promise to sustain by authority.

Respondents further say that by the laws of Virginia (chapter 37, sections 3 and 4 of the Code of 1873, acts of 1881–'2, page 507,
68 section 20), by a fair construction of them, any property found on the premises is liable for taxation, and that in cases of taxation one man's property may be taken for another man's debt, particularly if this property is in the use and enjoyment of the tax payer by lease, contract, or otherwise.

Respondents deny that John Ed. Hamilton, treasurer, will be unable, financially, to meet any damages that may be recovered against him by proceedings at law, in the event of such recovery.

Complainants have not charged insolvency against respondent Hamilton, and such charge, if made, would be untrue, as he will be able to respond to any damages that can be recovered against him in these cases.

It is not true, as averred in the bill, that there are other railroad companies about to sue respondent Hamilton, and that therefore he will be unable to pay damages, for the respondents are glad to be

able to state that within the past few days all of the other railroads doing business in this State, liable for taxes, except those
69 in this suit, have come forward and arranged or paid the amount of their taxes, so that the complainants, The Winchester and Potomac, Winchester and Strasburg, Strasburg and Harrisonburg, and the Valley Railroad Companies, can now claim a monopoly in the distinction of resistance to the Commonwealth of Virginia in the collection of those resources that are indispensable to her prosperity.

Respondents deny the proposition that railroads or other common carriers are not equally with all other citizens amenable to the laws of the land. They deny that damages to railroads cannot be estimated, that they cannot get other cars and rolling-stock, and that for these reasons the injunction asked for should be granted.

They further deny that any multiplicity of suits necessitates the aid of a court of equity in this case. One suit for damages by the Baltimore and Ohio Railroad Company, or respective suits by the said four companies would, suffice for all purposes for damages if any should accrue.

70 And now, having fully answered all of the material allegations of the said bill, respondents pray that upon the hearing of the motion of the complainants for the preliminary injunction prayed for in this case, your honors will overrule said motion and refuse said injunction; and if upon the said hearing the injunction should be granted, may this answer be filed, and upon a motion hereafter to be submitted, may said injunction be dissolved and said bill dismissed.

And as in duty bound they will ever pray, &c.

S. BROWN ALLEN,
Auditor of Public Accounts.
D. R. REVELEY,
Treasurer of Virginia.
JOHN ED. HAMILTON,
Treasurer of Augusta County,
By F. S. BLAIR,
Attorney General.

71 STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

I, Robert D. Ward, a notary public for said city, in the said State, do certify that S. Brown Allen, D. R. Reveley, and John Ed. Hamilton, whose names are signed to the foregoing answer, each made oath before me that the statements and allegations in the said answer are true, so far as they rest upon their own knowledge, and they believe them to be true so far as they rest upon information obtained from others.

Given under my hand, this —day of April, 1883.

R. D. WARD, *N. P.*

The following are the exhibits filed with said answer and are in the words and figures here following, to wit:

72 *Railroad Companies.—Report for the year* 1882 *of the Winchester and Potomac Railroad Company, Va., showing the Estimated Value of its Real and Personal Property of every description taxed at forty cents on the* $100 *value thereof.*

(See the law on the other side.)

In what county or corporation property is located—Frederick Co., Va., Jefferson Co., W. Va.

Value of roadway and tract—$55,000.00.

Value of depots, depot grounds, and lots, station buildings, & fixtures, & machine shops—$2,000.00.

Real estate not included in other classes—None.

Rolling stock, including freight, cattle stock, baggage, mail, express, sleeping, palace, parlor, and all other cars owned or belonging to the company, boats, machinery, and equipment—None. Owned by the Baltimore and Ohio Railroad Co., a corporation of the State of Maryland.

Stores—None.

Telegraph lines—None.

Miscellaneous property—None.

Total value of all property, real & personal—$57,000.00.

Total tax on real and personal property—$228.00.

Entire length of road—32 miles.

Entire length of line in Virginia—11 miles.

Proportion the length of road bears to the entire length of the road—11-32.

Remarks—This road extends from Harper's Ferry, a point on the main line of the B. & O. R. R., in W. Va., to Winchester, Frederick Co., Va., a distance of thirty-two (32) miles, twenty-one (21) miles are in W. Va., and eleven (11) miles are in Virginia.

Report of Gross and Net Receipts for the year ending February 1, 188-, *made in pursuance of the Act Imposing Taxes on Railroad Companies, &c.*

Amount received from sale of tickets, Amount received from cash fares, not kept separately		$37,636 74
Amount received from freight transported		102,338 32
" " U. S. mail transported		2,093 14
Total gross receipts		$142,068 20
Cost of operation:		
Cost of repairs and rental	$117,140 32	
Am't of interest on indebtedness	14,535 00	
Total expense		131,675 32
" income		$10,392 88

Entire length of road, 32 miles.
Entire length of road in Virginia, 11 miles.
Proportion the length of road in Virginia bears to the entire length of road, 11-32.
Apportionment of income to length of road in Virginia, $3,572.55.
Tax on such income at one per centum, $35.73.

W. H. IJAMS,
Treas. Balto. & Ohio Railroad Co., Operating the Winchester & Potomac Railroad.

STATE OF NEW YORK, } *Sc.*
City and County of New York, }

This day, W. H. Ijams, treasurer of Baltimore & Ohio Railroad Company, operating the Winchester & Potomac railroad, personally appeared before me, in my county aforesaid, and made oath that the foregoing report is correct.
Given under my hand, this the 7th day of August, 1882.

J. B. NORRIS,
Commissioner of the Commonwealth of Virginia, in New York, No. 91 Duane St.

73 *Railroad Companies.—Report for the year* 1882 *of the Winchester and Strasburg Railroad Company, Va., showing the Estimated Value of its Real and Personal Property of every description taxed at forty cents on the* $100 *value thereof.*

In what county or corporation property is located—Frederick & Shenandoah counties.
Value of roadway and tract—$95,000.00.
Value of depots, depot grounds and lots, station buildings and fixtures, & machine-shops—$1,000.00.
Real estate not included in other classes—None.
Rolling stock, including freight, cattle stock, baggage, mail, express, sleeping, palace, parlor, and all other cars owned or belonging to the company, boats, machinery, and equipments—None. Owned by the Baltimore and Ohio R. R. Co., a corporation of the State of of Maryland.
Stores—None.
Telegraph lines—None.
Miscellaneous property—None.
Total value of all property, real & personal—$96,000.00.
Total tax on real and personal property—$384.00.
Entire length of road—19 miles.
Entire length of line in Virginia—19 miles.
Proportion the length of road in Virginia bears to the entire length of the road—19 miles.
Remarks.

Report of Gross and Net Receipts for the year ending February 1, 188–, *made in pursuance of the Act Imposing Taxes on Railroad Companies, &c.*

Amount received for sale of tickets Amount received for cash fares	not kept separate	$16,696 98
Amount received for freight transported		44,507 57
" " U. S. mail, &c.		1,256 55
Total gross receipts		62,461 10
Cost of operation:		
Cost of repairs and rental	$54,484 02	
Am't of interest on indebtedness	35,618 63	
Total expenses		$90,102 65
" deficit		27,641 55

Entire length of road—19 miles.
Entire length of road in Virginia—19 miles.
Tax on such income at one per centum—None.

W. H. IJAMS,
Treas. B. & O. R. R. Co., operating the Winchester and Strasburg Railroad.

STATE OF NEW YORK, *City and County of New York:*

This day, W. H. Ijams, treasurer of the Baltimore and Ohio Railroad Company, operating the Winchester & Strasburg railroad personally appeared before me, in my county aforesaid, and made oath that the foregoing report is correct, according to the best of his knowledge and belief.

Given under my hand, this the 7th day of August, 1882.

J. B. NORRIS,
Commissioner of the Commonwealth of Virginia, in New York, No. 91 *Duane St.*

74 *Railroad Companies.—Report for the Year* 1882 *of the Valley Railroad Company, Va., showing the Estimated Value of its Real and Personal Property of every Description taxed at forty cents on the* $100 *value thereof.*

In what county or corporation property is located—Rockingham and Augusta counties.

Value of roadway and track—$128,900.00.

Value of depots, depot grounds & lots, station buildings and fixtures, and machine shops—$4,250.00.

Real estate not included in other classes—$1,800.00.

Rolling stock, including passenger, freight, cattle stock, baggage, mail, express, sleeping, palace, parlor, and all other cars owned or

belonging to the company, boats, machinery, and equipment—None
Owned by the Baltimore and Ohio Railroad Company, a corporation of the State of Maryland.

Stores—None.

Telegraph lines—None.

Miscellaneous property—None.

Total value of all property, real & personal—$134,950.00.

Total tax on real and personal property—$539.80.

Entire length of road—$25\frac{78}{100}$ miles.

Entire length of line in Virginia—$25\frac{78}{100}$ miles.

Proportion the length of road in Virginia bears to the entire length of the road—$25\frac{78}{100}$ miles.

Remarks.

Report of Gross and Net Receipts for the Year ending February 1st, 188–, Made in Pursuance of the Act Imposing Taxes on Railroad Companies, &c.

Amount received for sale of tickets		$19,978 95
" " cash fares		537 20
" " freight transported		34,164 56
" U. S. mail, express, & miscellaneous		2,784 50
Total gross receipts		$57,465 21
Costs of operation:		
Cost repairs and rental	$49,231 82	
Am't of interest on indebtedness	6,028 99	
		55,260 81
Total income		$2,204 40

Entire length of road—$25\frac{78}{100}$ miles.

" " " " in Va.—$25\frac{78}{100}$ miles.

Apportionment of income to length of road in Virginia—2,204.40.

Tax on such income at one per centum—$22.04.

W. H. IJAMS,
Treasurer Valley Railroad Company.

STATE OF NEW YORK, }
City & County of New York, } *Sc:*

This day W. H. Ijams, treasurer of the Valley Railroad Company, personally appeared before me, in my county aforesaid, and made oath that the foregoing report is correct to the best of his knowledge and belief.

Given under my hand, this the 7th day of August, 1882.

J. B. NORRIS,
Commissioner of the Commonwealth of Virginia in New York, No. 91 Duane St.

75 *Railroad Companies.—Report for the Year* 1882 *of the Strasburg & Harrisonburg Railroad Company, Va., showing the Estimated Value of its Real and Personal Property of every description, taxed at forty cents on the* $100 *value thereof.*

In what county or corporation property is located—Shenandoah and Rockingham counties.

Value of roadway and track—$245,650.00.

Value of depots, depot grounds & lots, station buildings and fixtures, and machine-shops—$5,650.00.

Real estate not included in other classes—None.

Rolling stock, including passenger, freight, cattle stock, baggage, mail, express, sleeping, palace, palor, and all other cars owned or belonging to the company, boats, machinery, and equipment—None. Owned by the Baltimore and Ohio Railroad Company, a corporation of the State of Maryland.

Stores—None.

Telegraph lines—None.

Miscellaneous property—None.

Total value of all property, real and personal—$251,300.00.

Total tax on real and personal property—$1,005.20.

Entire length of road—$49\frac{13}{100}$ miles.

Entire length of line in Va.—$49\frac{13}{100}$ miles.

Proportion the length of road in Virginia bears to the entire length of road—$49\frac{13}{100}$ miles.

Remarks.

Report of Gross and Net Receipts for the Year Ending February 1, 188–, *Made Pursuance of the Act Imposing Taxes on Railroad Companies, &c.*

Amount received for sale of tickets Amount received for cash fares	Not kept separately		$40,614 19
Amount received for freight transported			80,566 25
" " " U. S. mail "			3,255 40
Total gross receipts			124,435 84
Repairs and rental		$220,288 51	
Total expenses			$220,288 51
" deficit			$95,852 67

Entire length of road—$49\frac{13}{100}$ miles.

Entire length of road in Va.—$49\frac{13}{100}$ miles.

Tax on such income at one per centum—None.

W. H. IJAMS,
Treasurer Baltimore & Ohio Railroad Co.,
Operating the Strasburg and Harrisonburg Railroad.

STATE OF NEW YORK, }
City & County of New York, } *Sc:*

This day W. H. Ijams, treasurer of the Baltimore & Ohio Railroad Company, operating the Strasburg & Harrisonburg railroad, personally appeared before me, in my county aforesaid, and made oath that the foregoing report is correct [to] the best of his knowledge and belief.

Given under my hand, this the 7th day of August, 1882.

J. B. NORRIS,
Commisioner of the Commonwealth of Virginia in New York,
No. 91 *Duane St.*

76 The following is the law printed upon the back of said last statement, and is in the words and figures here following, to wit:

Sections 20 and 21 of the act for the assessment of taxes, &c., approved April 22d, 1882.

Railroad and Canal Companies.

20. Every railroad and canal company not exempted from taxation by virtue of its charter shall report annually, on the first day of June, to the auditor on public accounts, all of its real and personal property of every description as of the first day of February of each year, showing particularly in what county or corporation such property is located, and classifying the same under the following heads:

First. Roadway and track or canal bed.

Second. Depots, depot grounds and lots, station buildings and fixtures, and machine shops.

Third. Real estate not included in other classes.

Fourth. Rolling stock, including passenger, freight, cattle, or stock, baggage, mail, express, sleeping, palace, and all other cars owned by or belonging to the company, boats, machinery, and equipments, houses and appurtenances occupied by lock-gate keepers and other employees.

Fifth. Stores.

Sixth. Telegraph lines.

Seventh. Miscellaneous property.

77 Every such company shall also report, on or before the first day of June of each year, the gross and net receipts of the road or canal for the twelve months preceding the first day of February of each year, and in all cases the report shall be so made as to give the dates on which the same is made. If such road or canal is only in part within the commonwealth, the report shall show what part is within the commonwealth, and what proportion the same bears to the entire length of the road or canal, and shall apportion the receipts accordingly.

The reports herein required shall be verified by the oath of the president or other proper officer.

Upon the receipt of every such report it shall be the duty of the auditor of public accounts to lay out the same before the board of public works, who shall after thirty days' notice, previously given to the president, treasurer, or other proper officer, proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured, and to this end shall be authorized and empowered to send for persons and papers should [it] be deemed necessary. A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad or canal company so assessed, whose duty it shall be to pay into the treasury of the State within sixty days after the receipt thereof
78 the tax which may be imposed thereon by law.

A company failing to make such report, or to pay the tax assessed upon its property, shall be immediately assessed, under the direction of the auditor of public accounts, by any person appointed by him for the purpose, rating their real estate and rolling stock at twenty thousand dollars per mile, and a tax shall at once be levied on such value at the annual rate levied upon the value of the other property for the year. Such tax so levied, as well as the sum required to be paid upon the report hereinafter mentioned, if the same be not paid at the time provided herein, shall be collected by any treasurer to whom the auditor may deliver the assessment or a copy thereof. The treasurer may distrain and sell any personal property of such company, and shall pay the taxes into the treasury within three months from the time of the assessment, or a copy, as aforesaid, may be delivered to him.

Tax on Railroad and Canal Companies.

21. On the real and personal property of every railroad and canal company there shall be a tax of forty cents on every one hundred dollars of the estimated value thereof, the proceeds of one-fourth of which shall be applied to the support of the public free schools of the State. Every railroad and canal company shall also pay to the State an income tax of one per centum per annum, which income shall be ascertained by deducting the costs of operation, re-
79 pairs, and interest on indebtedness from gross receipts.

The following are the affidavits filed in this case, and are in the words and figures here following, to wit:

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

Personally appeared before me, deputy clerk of the district court of the United States for the eastern district of Virginia, James Bumgardner, whose name*d* is signed to this affidavit, who made oath as follows:

None of the cars or engine and tender levied on by John E. Hamilton, treasurer, and involved in this case are owned by the Valley Railroad Company.

The status of the Valley railroad and the Baltimore and Ohio

railroad, now and for years past, hath been and is as follows: None of the cars and engines run over the Valley railroad (which extends from Staunton, in Augusta Co., to Harrisonburg, in Rockingham county, Va.) are owned by the Valley railroad, but are all owned by the Baltimore & Ohio railroad. For all freight and passengers, &c., carried on said cars the Valley railroad gets all fares, freights, and charges, if claimed, from Staunton to Harrisonburg, or any intermediate point, alone, or from Harrisonburg to Staunton, or any intermediate point, and if such freights & passengers, &c., are carried down the Valley beyond Harrisonburg, the said fares, freights, & charges are *pro rata* between the said two roads.

80 From all the said fares, freights, and charges, payable to the Valley road, is paid by the Valley road, whose agents alone act on said Valley road, and receive the same for each engine and car run over that road to the Balto. and Ohio railroad, a charge for use thereof. All the taxes of the Valley railroad are chargable against and payable by said Valley railroad alone, and not chargable against or payable by the Balto. and Ohio Railroad Company. In no other manner is said Valley road connected with and devoted to the purpose and use of said Balto. and Ohio Railroad Co.; nor has said Balto. and Ohio Railroad Co. recognized its liability nor held itself out to the world and the State as liable for said taxes on said Valley road; nor hath it any other control by any contract or arrangement of said Valley road than as above set forth. The Davis, who is road-master of the Valley railroad, is a different man from W. Davis, who is assistant to the first vice-president of the Balto. and Ohio railroad; and while the annual reports for said Valley railroad to the auditor are made out and sworn

81 to by W. H. Ijams, who is the treasurer of the Balto. and Ohio Railroad Co., they are so made out and sworn to by him as secretary and treasurer of the Valley railroad, which office he fills.

That the Balto. and Ohio Railroad Co. is a citizen of the State of Maryland.

Witness my hand, this 23rd day of April, 1883.

JAMES BUMGARDNER.

Subscribed and sworn to before me, this 23rd day of April, 1883.

WM. B. WALL,
Dep'ty Clerk U. S. District Court, &c.

82 STATE OF VA., *City of Richmond,* } *To wit:*

Personally appeared before me, Pleasants, clerk of the circuit court for the eastern district of Va., Wm. B. Compton, who made oath as follows:

The Baltimore and Ohio Railroad Company is a citizen of the State of Maryland, and not of Virginia.

That he, the said affiant, hath read the affidavit of James Bumgarden herein, touching the arrangement between the Valley and

the Balto. and Ohio Railroad Company, and believes the statement therein contained to be true. Affiant states that he knows that now and for years past the Valley road is chargable alone with its own taxes, has no engines or cars on its track or running over it, that the personal property herein involved is the property of the Balto. and Ohio Railroad Co. alone, and that said Valley road has alone its own agents on its line who collect all freights, fares and charges for passengers and freight carried over said Valley road.

That John E. Hamilton is assessed with $4,400.00 realty
83 and $—— personalty; and that the engine, tender, and cars herein involved, are worth at the least the sum of from twenty-five to thirty thousand dollars, in his judgment.

That the notice of the assessment of the taxes for 1882 involved in this cause against the Balto. and Ohio R. R. Co., or the roads herein involved, was first received by W. H. Ijams, treasurer of the Balto. and Ohio Railroad Co., or by any official thereof, on the 17th day of January, 1883.

That a day or two after the first seizure of the engine and cars by John E. Hamilton, treasurer, as referred to in the bill, said engine and cars were certainly until April 11th or 12th, 1883, remained idle standing on the track; in consequence whereof the business of the Balto. and Ohio railroad over the line of roads herein involved has been blocked and seriously interfered with, so that many contracts for carriage of valuable and large amounts of freights to short and long distances could not be fulfilled by said company, to its great inconvenience, loss, and injury. The supervisor of the Balto. and
84 Ohio R. R. Co. over said lines, by numerous telegrams and conferences immediately ensuing upon said seizure, stated to affiant repeatedly his complications and embarrassments in relation to said carriage of freights under said contracts, and continuously since hath so done, until affiant came to *to* Richmond, Va., from Harrisonburg, where he resides, on April 13th, '83; so that affiant's means of information were reliable. The J. W. Davis, who is assistant to the first vice-president of the Balto. and Ohio railroad, is a different man from the Davis who is roadmaster of the Valley railroad; and W. H. Ijams as treasurer and secretary of the Valley railroad, and not as treasurer of the Balto. and Ohio railroad, though he occupies both positions, made out and made oath to the annual reports of the Valley railroad to the auditor, as appears by the exhibits filed with the answer herein.

Given under my hand and seal, this 23rd day of April, 1883.

W. B. COMPTON.

85 UNITED STATES OF AMERICA, }
Eastern District of Virginia, } *To wit:*

This day W. B. Compton personally [appeared] before me, and made oath that the statements made in the foregoing affidavit are true so far as made or his own knowledge, and he believes them to be true so far as made on information drawn from others.

Given under my hand and seal, this 24th day of April, 1883.

R. D. WARD, *N. P.*

86 STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

This day W. R. Smith personally appeared before me, a nota
public for the said city in my corporation aforesaid, and made oa
as follows: I am clerk in the office of the auditor of public accoun
of the State of Virginia, and have charge of the accounts of the tax
of the State against railroads. I have examined the reports of th
Winchester and Potomac railroad, Winchester and Strasburg
Strasburg and Harrisonburg and the Valley Railroad Companies
made to the auditor's office for the year 1882, and those which
now have before me are the reports regularly returned for those R.
R's and are genuine. They are the same reports filed with the an-
swer of S. Brown Allen and others, in the case of the B. and Ohio
Railroad Co. against them. Marked Exhibit A.

The reason that the coupons offered by Judge Sheffey and Mr.
Davis, representatives of the foregoing R. R., in payment of their
87 taxes, and refused under instruction of the auditor, is because
they were not established and verified to be genuine by the
court, as is required by act of Assembly of January 14th,
1882.

I was acting secretary of the board of public works when the said
board assessed the said railroads on the 22d day of November, 1882,
and as such I sent copies of the said R. R. assessments, referred as
extract A, to the treasurer of said companies who is W. H. Ijams,
during the first week in December, 1882, and I again sent to the
said treasurer other copies of said assessments within one week be-
fore the 22d of January, 1883, mailing them to his P. O. address,
Baltimore, Md. The coupons referred to were offered by Judge
Sheffey and Mr. Davis at the auditor's office, on the 16th day of
March, 1883.

W. R. SMITH.

I have read the above affidavit of W. R. Smith, one of the clerks
in my office, and believe the statement it contains to be true. I
further state that all the other railroads of the State have paid or
satisfactorily arranged to pay their taxes.

S. BROWN ALLEN,
Aud. Pub. Ac'ts.

88 I, John Ed. Hamilton, say: That I am treasurer of Au-
gusta county, and as such was appointed by auditor Allen to
levy and collect the assessments referred to in extract filed in the
answer of S. B. Allen and others, in the case of B. and O. R. R. Co.
vs. them the said parties defendants. The property I levied upon
against the Valley Railroad Company was found upon the track of
the said R. road and in the possession of the said company at Staun-
ton. I do not believe that the property levied on, if sold at public
auction, would bring more than the amount of the tax due by the
company. Some of it was weather-beaten stock and box cars which
were much worn. I also levied upon an iron safe and four desks
that were undoubtedly the property of the Valley R. R. Company.

amply able to pay any damages that these companies may re- against me for excessive levies.

JNO. E. HAMILTON,
Tr. Augusta County.

I, J. W. Waddy, deposeth as follows:

I am the deputy treasurer of Augusta county, under J. E. milton. I went to Winchester and made a levey upon the prop- of the Winchester and Potomac, and Winchester and Strasburg R. Co's, at Winchester, for their respective taxes. I do not think the y was excessive, because some of the property levied upon was ich worn. It was in the possession of the said companies, and I s informed by the depot agent of these companies at Winchester at the same property was in their use and occupation. I am sat- fied that J. E. Hamilton, treasurer of Augusta county, is fully able pay any damages which may be recovered against him for exces- ve levy.

My levy did not interfere with their regular business, as the trains have been running regularly ever since, as I believe, and they have other rolling stock besides that levied upon. I levied upon the property of the Strasburg and Harrisonburg Co. at Harrisonburg, and what I have said about the other companies is also applicable to it.

J. W. WADDY,
Deputy Treasurer.

90 J. L. Glenn, being duly sworn, deposeth as follow-: I am the cashier of the Merchants' National Bank of Richmond. On the 16th day of March Judge Sheffey, attorney for the Valley railroad and other companies of the Winchester and Potomac, Winchester and Strasburg, Strasburg and Harrisonburg railroads, and Mr. J. W. Davis, who said he was the assistant to the 1st vice-president of the Balto. and Ohio R. R., presented certain coupons of the State of Virginia, as per schedule which he presented at the time, in payment of warrants filed with the schedule. I refused to accept them to be placed to the credit of the State. So far as I know the coupons presented to me had not been proved by the court to be genuine, as required by act of assmbly. I am not a collector of railroad taxes due the State. The State makes some of the deposits at the bank at which I am cashier.

J. F. GLENN.

91 James M. Taylor deposes as follow-: I am the first clerk in the office of the treasurer of Virginia, and, as such, am acting treasurer in the absence of the treasurer. On the 16th of March, 1882, Judge Sheffey and another man, whom I learned to be Mr. Davis, called at the treasurer's office for the purpose of paying the taxes of the Winchester and Potomac, Winchester and Strasburg, Strasburg and Harrisonburg, and the Valley R. road due to the State. They brought the warrant of the auditor on the treasury of said State for said taxes. I merely endorsed the warrants and sent

86 STATE OF VIRGINIA, } *To wit:*
City of Richmond, }

This day W. R. Smith personally appeared before me, a notary public for the said city in my corporation aforesaid, and made oath as follows: I am clerk in the office of the auditor of public accounts of the State of Virginia, and have charge of the accounts of the taxes of the State against railroads. I have examined the reports of the Winchester and Potomac railroad, Winchester and Strasburg, Strasburg and Harrisonburg and the Valley Railroad Companies, made to the auditor's office for the year 1882, and those which I now have before me are the reports regularly returned for those R. R's and are genuine. They are the same reports filed with the answer of S. Brown Allen and others, in the case of the B. and Ohio Railroad Co. against them. Marked Exhibit A.

The reason that the coupons offered by Judge Sheffey and Mr. Davis, representatives of the foregoing R. R., in payment of their taxes, and refused under instruction of the auditor, is because
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I was acting secretary of the board of public works when the said board assessed the said railroads on the 22d day of November, 1882, and as such I sent copies of the said R. R. assessments, referred as extract A, to the treasurer of said companies who is W. H. Ijams, during the first week in December, 1882, and I again sent to the said treasurer other copies of said assessments within one week before the 22d of January, 1883, mailing them to his P. O. address, Baltimore, Md. The coupons referred to were offered by Judge Sheffey and Mr. Davis at the auditor's office, on the 16th day of March, 1883.

W. R. SMITH.

I have read the above affidavit of W. R. Smith, one of the clerks in my office, and believe the statement it contains to be true. I further state that all the other railroads of the State have paid or satisfactorily arranged to pay their taxes.

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I am amply able to pay any damages that these companies may recover against me for excessive levies.

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My levy did not interfere with their regular business, as the trains have been running regularly ever since, as I believe, and they have other rolling stock besides that levied upon. I levied upon the property of the Strasburg and Harrisonburg Co. at Harrisonburg, and what I have said about the other companies is also applicable to it.

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J. F. GLENN.

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them to the Merchants' National Bank, a State depository, with directions to the bank to receive the said amount of said taxes. At the time there was neither a tender or refusal of coupons. An hour or two later, the same gentlemen called again and made an offer to tender coupons, which I declined, because coupons could only be paid on a warrant of the second auditor, which they did not have.

92 They produced no certificate that the coupons had been proved to be genuine by the judgment of a court, and there was no offer by the parties to pay the taxes in money, except the fractional parts. I feel satisfied that the coupons had not been proved to be genuine, as the act of January, 1882, requires, nor did they ever affirm, at the time, that they had been.

The office of the State treasurer does not refuse to pay the warrants of the second auditor for coupons that have been decided by the courts to be genuine, and in this way make the coupons so verified receivable for taxes.

J. M. TAYLOR,
Act'g Treasurer.

I, Robert D. Ward, a notary public for the city of Richmond, do certify that W. R. Smith, S. Brown Allen, Jno. E. Hamilton, J. W. Waddy, J. F. Glenn, and J. M. Taylor, each, respectively, made oath before me that the statements to which these names are signed are true to the best of their knowledge, information, and belief.

Given under my hand, this 21st day of April, 1883.

R. D. WARD, *N. P.*

93 And at another day, to wit, on the 26th day of January, in the year of our Lord one thousand eight hundred and eighty-four, the following order was entered of record, which order is in the words and figures here following, to wit:

BALTIMORE & OHIO RAILROAD COMPANY
vs.
S. BROWN ALLEN & others. } In Chancery.

This day came again the parties by their attorneys, and the complainant by leave of the court filed its general replication to the answers heretofore filed by the defendants, and thereupon issue is joined thereon between said complainant and defendants, &c.

The following is the replication filed by said complainant on the 26th day of January, 1884, and is in the words and figures here following, to wit:

BALTIMORE & OHIO RAILROAD COMPANY
vs.
S. BROWN ALLEN & others. } In Chancery.

94 The replication of the Baltimore & Ohio Railroad Company, complainants, to the answers of S. Brown Allen, D. R. Reveley, and John E. Hamilton, defendants:

This repliant saving and reserving unto itself now, and at all times

hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers, for replication thereto says: That it will aver, maintain, and prove its said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied to by this repliant within this, that any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by its said bill it has already prayed.

W. B. COMPTON,
Of Counsel for Complainant.

95 And at another day, to wit, on the — day of ——, in the year of our Lord one thousand eight hundred and eighty-——, the following final decree was entered of record in this case, which is in the words and figures here following, to wit:

THE BALTIMORE & OHIO RAILROAD COMPANY
vs.
S. BROWN ALLEN, Auditor of Virginia, D. R. REVELEY, Treasurer of Virginia, and JOHN ED. HAMILTON, Treasurer of Augusta County, Virginia. } In Chancery.

By consent of parties, by their counsel, it is ordered that the writing marked "X," and entitled "Agreement of parties by counsel," be filed and made part of the record in this case.

And its appearing that the bond in the penalty of seventeen thousand dollars, with adequate sureties thereon, has been given by the complainant, as required by the decretal order of the 15th of May, 1883, entered herein, directing and awarding a preliminary injunction to restrain the defendants from further proceedings under the levy for taxes claimed by them to be due from the complainant to the State of Virginia, as set forth in the bill and proceedings named in said order; and process having issued and been duly
96 executed on the defendants, and the cause being regularly on the docket, and, by consent of parties by their counsel, the cause being deemed and taken to be matured for final hearing, came, on this day, to be heard on the bill, and exhibits the demurrer to the bill, with joinder therein, the answer of the defendants, with general replication thereto, the examination of witnesses and parties in the form of affidavits and depositions, the writing marked "X," and the agreements contained therein, other exhibits than those filed with the bill, and upon a motion *pro forma*, submitted by the defendants, for a dissolution of the injunction aforesaid, awarded on the 15th day of May, 1883, to restrain the defendants and any of them from proceeding to collect said taxes or to enforce said liens, or any of them, as set forth in the bill," and was argued by counsel.

On consideration whereof it is adjudged, ordered, and decreed that the demurrer be overruled, and that the motion of the defendants to dissolve said injunction be also overruled, and that the injunction aforesaid be, and the same is hereby, perpetuated, and that the defendants pay to the complainant its costs expended in the prosecution of this suit.

97 And on motion of the defendants, by counsel, an appeal to the Supreme Court of the United States is hereby allowed them from the order perpetuating the injunction heretofore granted in this cause.

HUGH L. BOND, *Ct. Judge.*

The following is a true copy of Exhibit "X," filed in said cause, and mentioned in said decree, and is in the words and figures here following, to wit:

In the Circuit Court of the United States for the Western District of Virginia.

THE BALTIMORE AND OHIO RAILROAD CO. *vs.* S. BROWN ALLEN and others. } In Chancery.

The parties, by their counsel, desiring that the above cause shall be promptly disposed of in the said circuit court, so that the questions involved may be speedily and finally decided by the Supreme Court of the United States, with a view to this end, do agree:

First. That at as early a day as may suit the convenience of said court, the said cause shall be submitted for final hearing and

98 decree, and that at such hearing the exhibits and affidavits read at the preliminary hearing shall be taken, received, and read respectively as exhibits duly proved, and as depositions regularly taken, that the papers filed by the defendants, as their joint and several affidavits, shall at said final hearing be taken, received, and read as their joint and several answers, upon which issue shall be deemed to have been duly made up; and thereupon the cause shall be submitted to the court for such final decree upon the pleadings, issues and proofs aforesaid, and on the agreements of parties contained in this writing, and on any other exhibits, affidavits, or depositions which may, by consent of parties, be proved, taken, and filed before such final hearing, and also upon a motion, as if made in due form by the defendants for a dissolution of the injunction awarded in said cause by the decree therein rendered on the — day of May, 1883.

Second. That at such final hearing in connection with that portion of said decree of May —, 1883, as delares "that the tender of coupons by the complainant was a valid tender in payment of the taxes assessed, as stated in the bill, and that the liens made by

99 J. Ed. Hamilton, treasurer, &c., to collect said taxes thereafter were and are illegal," it shall be taken, as admitted, that the coupons shown with the bill and tender, as alleged in the bill, and admitted by the answer, are genuine tax, receivable coupons, as

charged by the bill and not denied by the answer, and that the tender of said coupons as made to the first auditor shall be treated as made, also to the second auditor of Virginia; but it is understood that the aforesaid concession as to the genuiness of said coupons is without prejudice to the contention of the defendants in other respects, that is to say: That said coupons, though genuine, have not been subjected to the test of jury trial under the act of January 14, 1882.

Third. It is conceded that after the payment of his debts and those for which he is bound, & which he will probably have to pay, and after setting a part out of his estate a sum equivalent to his homestead and legal exemption, the residue of the estate of J. Ed. Hamilton, does not exceed in value $8,000.00, and including the amount of such homestead and other legal exemption it does not exceed in value $10,000.00; but that said J. Ed. Hamilton had executed an official bond, as treasurer of Augusta county, in the penalty
100 of $200,000.00, with sureties, which had been approved by the court, a copy of which may be filed for greater certainty, if either party elects so to do. But either party may file copies of the assessments of said Hamilton's property as a part of the evidence.

Fourth. That should the property of complainant levied on by said John Ed. Hamilton, be sold, as advertised in the Valley Virginian, great sacrifice and loss must result therefrom; and that the withdrawal from complainants' use of the amount of rolling-stock and machinery levied on and proposed to be sold as aforesaid will cause serious and prolonged embarrassment to complainant's business; that much delay must accrue before such rolling-stock and machinery, if sold, can be replaced, and that it will be difficult, if not impracticable, to ascertain and estimate, with even proximate certainty, the losses and damages which would result to complainant from such sale; so that altho' the estate of said J. Ed. Hamilton should be sufficient to meet any verdict for damages, in case the sale *the sale* should be adjudged to have been illegal, the pecuniary value of the complainant's losses and damages could not
101 be properly and adequately ascertained and fixed by the verdict of a jury.

But that said company has much other rolling-stock not embraced in the levy employed on this and its other lines.

Fifth. That it is conceded, for the purposes of this suit, that the Baltimore and Ohio Railroad Company is the lessee of the three railroads, styled the Winchester & Potomac, the Winchester and Strasburg, and the Strasburg & Harrisonburg railroads, and that the property of the complainant found on the leased premises is and was liable to legal levy for taxes due the Commonwealth of Virginia; but said Baltimore and Ohio Railroad Company is not, and was not at the time of the levy in this case, in possession of the tract and property of the Valley Railroad Company as lessee or rentor, or in any manner liable for the taxes or debts of the Valley Railroad Company or otherwise whatsoever. That the Valley Railroad Company is now, & was at the time of said levy, in the exclu-

sive possession of and now exercises, and at the time of such levy did exercise, exclusive control over its own tract and property; that it owns no rolling stock, and has its work done in and by the engines, cars, and rolling stock of the Baltimore and Ohio Railroad Com-
102 pany and other companies for hire, and that the property levied on for the taxes of the Valley Railroad Company, with the exception of a few articles of office furniture, was wholly and exclusively the property of the Baltimore & Ohio Railroad Company, and was found on the tract of the Valley Railroad Company. But it is understood that the court shall, upon this statement of facts, decide whether the property of the Baltimore & Ohio Railroad Company was, under the circumstances, liable to legal levy for the taxes due from the Valley Railroad Company.

Sixth. It is conceded that notice of the assessments by the board of public works against the four companies was received by John W. Davis, assistant to vice-president of the Baltimore & Ohio Railroad Company, on the 17th day of January, 1883, and that prior thereto no notice of such assessments was given to any person representing either of said companies, or to either of said companies as required by the act of assembly.

Seventh. That John W. Davis is the assistant to the vice-president of the Baltimore & Ohio Railroad Company, and that James W. Davis is the track master of the Valley Railroad Company, and has had no connection with this case.

Eighth. It is conceded that the bond in the penalty of seventeen thousand dollars, with sufficient sureties thereon, has been
103 given by the complainant in accordance with the decretal order of May —, 1883, awarding the preliminary injunction; that process thereon has been issued and executed on the defendants, and it is agreed that the cause shall be placed on the docket as duly matured for hearing.

Ninth. In making up the record it shall not be necessary to copy all the coupons shown with the bill, but only one or more of them as samples of the same tendered and under the control of the court.

On the back of said agreement is the following endorsement:

"We consent that the within paper may be filed and its contents made part of the record in the above-entitled cause pending in the United States court for the western district of Virginia.

"HUGH W. SHEFFEY,
"*Counsel for B. & O. Co.*
"F. S. BLAIR,
"*Att'y Gen., for Def'ts.*"

The following is a copy of an exhibit attached to said agreement "X," and is in the following words and figures here following, to wit:

104 STATE OF VIRGINIA, *Clerk's Office, County Court of Augusta County:*

The undersigned, clerk of the county court of Augusta county, in the State of Virginia, hereby certify that it appears from the com-

missioner's land book of South River district, (page 17, line 15,) filed in the office of said court for the year 1883, John E. Hamilton is assessed for taxation with the following real estate in the county of Augusta, viz:

161¾ acres adjoining Hamilton and others, east 5 miles from court-house, @ $19.00 per acre; buildings, $800; total land and buildings	$3,062 56
And further, that for same year (1883) on the comm'r's property book for same district (page 18, line 6), said Hamilton is assessed with personal property for taxation aggregating in value	$1,300 00
Total	$4,362 56

And further, that it does not appear that said Hamilton is assessed with any other property in the county of Augusta for taxation.

Given under my hand and the seal of the court aforesaid, in office at Staunton, Virginia, this 22d day of January, 1884.

[L. S.] WILLIAM A. BURNETT, *Clk.*

105 The following is the opinion of the honorable circuit judge filed in this cause, and is in the words and figures here following, to wit:

THE BALTIMORE & OHIO RAILROAD COMPANY
vs.
JOHN E. HAMILTON *et al.*

The facts in this case as shown by the affidavits and proofs filed are few:

The complainant is the Baltimore and Ohio Railroad Company, a corporation of Maryland which operates certain roads in Virginia.

These roads were duly assessed for taxes by the State officers to the amount of $64.11, for which sum the complainant tendered in payment coupons of the bonds of the State of Virginia issued under the act of March 30th, 1871, "receivable at and after maturity for all taxes and debts, dues, and demands due the State."

Not regarding the tender as a legal settlement of the debt, the defendants, as they were required to do by the State law providing for the taxation of railroads, after sixty days' default, assessed the companies thirty per cent. in addition to their real tax, as a penalty for their default.

The defendant, Hamilton, as tax collector, has seized the property of the complainant and threatens to sell it for the amount of the taxes and the penalty.

106 The bill asks that he may be enjoined from so doing, that the tender of the coupons may be regarded as payment or extinguishment of the debt, and that the company may not be subjected to a penalty for doing what the act of March, 30th, 1871, contracted with the holders of such coupons he might do.

That the coupons must be received for public taxes, when tendered,

the Supreme Court of the United States has, at its last term, emphatically decided. (Antoin *vs.* Greenhow.) The language of the court is: "The right of the coupon holder is to have his coupons received for taxes when offered." The fact here is that the complainant tendered coupons, and that they were rejected, and the tax increased, because coupons and not money were so offered. It is clear, then, that a right of the coupon holder has been denied according to the interpretation of the act of March 30th, 1871, by the Supreme Court. What remedy has he? In the case of Antoin and Greenhow mandamus was sought as the remedy, but the forms of proceeding in that proceeding in Virginia were not complied with, for the reason that the complainant alleged they were unconstitutional because they impaired the obligation of the contract. But the Supreme Court decided that the writ of mandamus now existing in Virginia did not differ so much from the remedy existing
107 when the coupons were issued as to impair the obligation of the contract.

It expressly decided, as we have seen above, that the right of the coupon holder was to have them received when offered, but it also decided that if he sought by mandamus to compel such receipt, he must follow Virginia practice in obtaining that remedy.

The allegation or claim of this complainant is that it owes no taxes; that the tender of the amount in coupons has paid or extinguished the debt. It does not ask the court to compel the tax collector to do any act he refuses to do, but to stop him from doing an unlawful thing, namely, from taking property for taxes when none are due, and from imposing a penalty when there is no default; and, surely, although the writ of mandamus is altered so as to be useless for the purpose of his case, and the writ of replevin is wholly abolished in Virginia, the Supreme Court has not decided that the complainant has no remedy whatever. Had such been its decision, it would have declared that the words "was receivable when offered," meant or should read, "was receivable after they had been reduced to judgement," for that is the only form under which, by the writ of mandamus, the receipt of coupons can be compelled in Virginia.

108 The complainant alleges that a large part of its rolling stock on the taxed roads in Virginia is in custody. That it cannot while such is the case fulfil its transportation contracts, the non-performance of which will subject it to numberless suits for breach of such contracts, and to the liability for large damages.

In general, courts of equity are slow to restrain the collection of taxes. They will not do so because the tax is alleged to be void or illegal, 92 U. S., 515; but where there will be irreparable damage, as is plain in this case, and when all taxes have been paid by the tender of coupons receivable for taxes, and the complainant has been subjected to a larger assessment by reason of its offer of tax-paying coupons rather than money; which offer the Supreme Court has decided it was its right to make. I think an injunction ought to issue.

This is not alleged to be a void and illegal tax; it is asserted to be a paid one, and paid in the way complainant had a right to pay it.

The bill does not seek a remedy under any of the methods of practice provided by Virginia.

It appeals to the equity jurisdiction of the United States Courts.

The complainant is a non-resident of this State asserting a right which the Supreme Court, in Antoin- and Greenhow, as I understand it, decides that it has, and a failure to enforce which will cause it irreparable damage.

109

The complainant has no adequate remedy at law. The writ of *mandamus* is of no avail to it; it has paid its debt once by the tender, and would have to pay it again, to get the remedy. It cannot get its goods back from the purchaser by replevin, for there is no such action in Virginia; it cannot sue the tax collector for trespass, for since the institution of the suit of Antonia and Greenhow, the State has by law forbidden it to do so. Altogether, it seems to me the complainant would be remediless, and its "right" a delusion, did not a court of equity listen to its complaint. The argument of the attorney-general, that this action is not within the jurisdiction of the court, because in fact it is a suit against the State, which does not permit itself to be sued, does not seem to me to be sound.

From the case of (9 Wheaton) Bank *v.* Osborn, down to the Arlington case recently decided, this form of action has been sustained by the Supreme Court in proper cases.

You may not sue the State unless she consents; and if she be an indispensable party not consenting, you can maintain no action at all. But she is not a necessary party, and the complainant here can prevent his anticipated wrong and irreparable damage by restraining the party who is about to commit it, without joining the State (Litchfield *v.* County of Hantly, 101 U. S., 781. (Note, Belknap *v.* Belknap, 2 Johns. Chancery Rep., 463.)

110

Nor does the fact that the State has provided a remedy for the complainant deprive him of any other that exists. The complainant is a non-resident of Virginia. His citizenship entitles him to apply to the United States courts for the exercise of their equity jurisdiction in a proper case. That jurisdiction was not derived from the States, but from the Constitution of the United States, and remains the same no matter what laws are passed by the States respecting legal remedies or forms of procedure.

This is the proper forum of the non-resident citizen, and he is not deprived of his rights in it by the passage of any act by the Legislature of Virginia respecting suits at law against the tax collectors of the State.

We have here a non-resident citizen. He seeks equitable relief against a tax collector who is about to do an act which, if this *prima facie* case made in the bill can be maintained, will do it irreparable damage in violation of the Constitution of the United States. This jurisdiction has been exercised many times by the United States courts in like cases, and, in my judgment, the prayer of the bill should be granted and the preliminary injunction issued as prayed, and it will be so ordered.

111

My brother, the district judge, does not concur, and files a separate opinion.

112 *The Coupon and Tax Question.*

May a State be enjoined from collecting her taxes by a Federal court?

If she can be at all, then under what circumstances?

Opinion of Hon. Robert W. Hughes, U. S. district judge for the eastern district of Virginia, sitting alone, in circuit court, 15th May, 1883, in a case from the western district of Virginia.

113 U. S. Circuit Court for the Western District of Virginia.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

v.

S. B. ALLEN, Auditor of Public Accounts of Virginia; DAVID R. REVELEY, Treasurer of Virginia; and JOHN ED. HAMILTON, Treasurer, residing in the County of Augusta, Virginia.

In Equity, on Motion for a Preliminary Injunction.

Statement of the Case.

The railroad which reaches from the border of Virginia beyond Winchester to Staunton is owned by four several companies, but it is operated by the Baltimore and Ohio Railroad Company, the complainant in this cause. The part between the State border and Winchester is owned by the Winchester and Potomac Company; that between Winchester and Strasburg is owned by the Winchester and Strasburg Company; and that between Strasburg and Harrisonburg, by the Virginia Midland Company. These three roads are under lease to the complainant. The road between Harrisonburg and Staunton is owned by the Valley Railroad Company, and is operated by the complainant. The four roads are operated practically as one line by the complainant; none but its own locomotives, cars, and trains being used upon them; and the complainant having the exclusive control of the running of the trains in all the business which is conducted. These roads are all leased by the complainant, except the Valley railroad, which seems to have a contract by which it has reserved the privilege of employing its own depot agents to collect freights, and its own conductors on passenger trains to collect tickets and fares; but the conductors are employees of the complainant for performing the same duties over the entire line. All four of the roads have as a common treasurer W. H. Ijams, who resides in Baltimore, and has his office in Baltimore.

114 These railroads were assessed for State taxes in December, 1882, by the board of public works of Virginia, in pursuance of section 20 of chapter 118, of the acts of 1881–'2, page 506. That section, after requiring certain annual reports from railroad companies, provides as follows in regard to railroads:

"Upon the receipt of every such report, it shall be the duty of the auditor of public accounts to lay the same before the board of pub-

lic works, who shall * * * * * proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured, and to this end shall be empowered," &c., &c. "A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad * * * company so assessed, whose duty it shall be to pay into the treasury of the State, within sixty days after the receipt thereof, the tax which may be imposed thereon by law. A company failing to * * * * pay the tax assessed upon its property shall be immediately assessed, under the direction of the auditor of public accounts, by any person appointed by him for the purpose, rating the value of their real estate and rolling stock at $20,000 per mile, and a tax shall at once be levied on such value at the annual rate" of forty cents in the hundred dollars.

The amount of the assessment made under the first provision of this law was based on a valuation of $15,000 a mile; and was, for the three leased roads, $4,818.12; and for the Valley road $1,593.04; making a total of $6,411.16. Notice was given during the first week in December, to W. H. Ijams, treasurer, in Baltimore, of this assessment. This notice was repeated during the week which commenced on the 15th January, 1883. The taxes so notified to be due were not paid within sixty days after the notices were sent. On this failure of payment the auditor of public accounts again assessed these roads in accordance with the second provision of the law above cited, "rating their real estate and rolling stock at $20,000 per mile." This second assessment, of course, added 33⅓ per cent. to the former one. In pursuance of the same provision of law, John E. Hamilton, treasurer of the county of Augusta, "appointed by the auditor for the purpose," proceeded to make a levy for the several amounts of tax thus assessed by the auditor on the following property of the complainant, viz: On twenty-two freight cars at Winchester; on one engine and fifteen freight cars at Harrisonburg; and on twenty-four freight cars at Staunton. He also levied on an iron safe and some furniture of the Valley Company at Staunton, which was all the personalty of that company which could be found. The levies at Staunton and Winchester were made on the 23d of March, and that at Harrisonburg on the 24th of March last.

On the 16th of March, 1883, agents of the complainant had appeared at Richmond and tendered tax-receivable coupons of interest alleged to have been cut from bonds issued by the State of Virginia in payment of the several amounts of taxes due under the first assessment that has been described. The tender was made first to the cashier of a bank having deposits of the State under a warrant of the treasurer authorizing the bank to receive the amounts of money due for taxes, and was refused. It was then made to the treasurer and the auditor of the State successively, who each refused the coupons. The agents did not tender the taxes in gold, silver, United States Treasury notes, or National bank notes, which are required to be paid in the discharge of taxes by the act of January 26th, 1882; chapter 41, section 1, page 37, acts of 1881–'2, nor did they deliver

or offer to deliver the coupons for verification as required by the act of January 14, 1882, chapter 7, page 10, of the same volume.

115 Complainant now brings this bill into this court in which S. Brown Allen, as auditor of public accounts of Virginia; David R. Reveley, as treasurer of Virginia, and John E. Hamilton, as treasurer, residing at Staunton, who is treasurer of the county of Augusta, are made the parties defendant.

The bill recites certain acts of the General Assembly of Virginia declaring that coupons of interest, such as those tendered by complainant, shall be receivable in discharge of all taxes and dues to State; avers the tender of coupons made on the 16th day of March, which coupons are now brought into this court, and complains among other things of the seizure of its cars and an engine by Hamilton, the defendant; of irreparable injury sustained; of cloud upon title resulting from illegal levy; of threatened multiplicity of suits; of obstruction in the performance of its duties to the public as a common carrier, and of the penalty inflicted upon it by the second assessment. The bill prays that the said Hamilton may be forever enjoined from further proceeding under the levies he has made; that the court will decree that the taxes first assessed were by the tender of the coupons and by the bringing them now into this court, paid off and discharged, and that the second assessment and the levies made under it were null and void. On the filing of the bill a motion was made by complainant for a preliminary order enjoining further proceedings under the second assessment, and enjoining the sale of the property levied upon. It is that motion which the court has now to deal with.

Opinion of Judge Hughes.

This is a suit against the State of Virginia, brought in a forum in which she has not consented to be sued in the manner chosen by this complainant. A suit against the public officers of a State, as such, seeking to control the funds of the State in their custody, or to "compel them to do acts which constitute a performance of its contract by the State," is a suit against the State itself. It is useless to cite authorities on this point. Suffice it to refer to the cases of Louisiana *v.* Jumel, Elliot *v.* Wiltz, and Antoni *v.* Greenhow, decided by the United States Supreme Court at the term just ended, and not yet reported. This suit is brought, therefore, in apparent violation of the Eleventh Amendment of the National Constitution, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State." It is true that the gravaman of this suit is the allegation that the State, by the action of her officers, the defendants, and by the laws under which they acted, has violated that provision of the National Constitution (Article 1, section 10, clause 1,) which declares that "no State shall pass any law impairing the obligation of contracts." But this provision was part of the original Constitution (Article 3, section 2, clause 1), which declared that "the judicial power of the United States should extend to controversies between a

State and citizens of another State," a clause that was held, in Chisholm *v.* Georgia, 2 Dallas, 419, to empower the citizen of another State to sue a State of the Union without its consent in a Federal court. It was to correct this evil that the Eleventh Amendment of the National Constitution was adopted, and it is, or ought to be, obvious law, that unless a State grants the right to be thus sued the right has ceased to exist; and that, if she grants it, the right can only be exercised in the manner in respect to which it shall have been granted. The Eleventh Amendment gives the State entire control of the remedy, so far as it concerns a Federal court,
116 which it may grant or withhold at its sovereign pleasure; and this power over the remedy being granted by the Eleventh Amendment exists in full force; the clause in the original Constitution, forbidding the impairment of contracts, to the contrary notwithstanding. The State of Virginia has not granted the right to be sued in the Federal courts upon her contracts, except as to a remedy at law to be mentioned in the sequel: and therefore, this court would seem to have no jurisdiction of the present cause, which is a suit in equity.

It is true that the Supreme Court of the United States, in The Arlington case, cited by complainant's counsel (United States *v.* Lee, 106 U. S., 196), affirming this court in S. C., 3 Hughes, 37, held that the United States might be sued in the persons of its officers, under circumstances which the court was careful to define. But in explanation of this ruling two things may be said, to-wit: 1st, the Eleventh Amendment does not forbid a suit against the United States; and 2d, the National Constitution provides in Amendment Fifth that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." The immunity of the United States from suit is that which inheres in sovereign power, as shown with such transcendent ability by Lord Somers in the Bankers' Case, 5 Modern Reports, 29-62. This power would have been absolute, except for this controlling and qualifying provision of the Fifth Amendment. In the case of the United States *v.* Lee, property had been taken without just compensation, and the immunity of the United States from suit, had, of necessity, to be qualified in pursuance of this express inhibition of the Constitution as amended; and so the suit of the dispossessed owner of Arlington was entertained.

But neither this provision of the National Constitution, nor this inherent attribute of sovereignty, applies in the case at bar. The immunity of States from suit in the Federal courts is an express constitutional canon; and the sale of private property for public taxes is not an appropriation of property without just compensation, or without due process of law. Whether, therefore, as to such appropriations, or as to contracts, it is plain that the States have immunity from suit in United States courts under the Eleventh Amendment, and this suit does not lie. Nor can it be sustained on other grounds.

Injunctions to restrain the collection of public taxes are contrary to public policy. In granting them the judicial department of gov-

ernment brings itself into conflict with the executive in the discharge of one of its most important functions, and violates that comity which should be observed between departments essentially distinct and independent in their respective powers and duties. The Legislature of Virginia very jealously prohibits the State courts from granting injunctions in restraint of the collection of State taxes; and Congress, in section 3224 of the Revised Statutes of the United States, forbids, in sweeping terms, "any suit" for enjoining the assessment or collection of "any" Federal tax from being maintained in "any court."

When, therefore, a Federal court, evading both these inhibitions, impliedly binding on it, assumes to enjoin a State in the collection of her public taxes, unless impelled by the most exigent circumstances and justified by the most cogent reasons, it transcends its proper sphere of jurisdiction, violates comity, and commits a trespass upon the most vital rights of the States. The Supreme Court of the United States has repeatedly condemned such proceedings, more especially in cases similar to the one at bar. State Railroad Tax Cases, 92 United States, 613 to 17; Dow *v.* Chicago, 11 Wal., 108; Hannewinkle *v.* Georgetown, 15 Wal., 547.

117 Since the 29th of March last, for a period of more than six weeks, this court has stood between the State of Virginia and the collection of an important part of her public revenues. One of the proceedings in which she interferred, viz., the suit which was commenced in replevin, was found to be unauthorized by law, and the court abandoned it after two weeks of obstruction. Thereupon the present proceeding was instituted, which has been pending since the 16th of April. Complainant's counsel endeavor to justify it on various grounds; some of them merely technical and nominal; others more deserving of serious consideration.

I will consider the more serious grounds of complainant set out in the bill. But before dealing with them I will first mention an obstacle in the way of this proceeding, which constitutes a formidable bar to the relief sought.

Interference by a court of equity with the collection of taxes is alwas discouraged, because of the inability of the chancery court to afford complete relief in the premises. It has no power to correct errors and repair mistakes in assessments; that being distinctly and exclusively a function of the executive. It has no jurisdiction to set the taxing machinery of the government in motion for the purpose of making levy and enforcing a legal tax in the event of the tax complained of being found to be illegal or unconstituional. It is powerless to apportion a tax—ratifying the part that is legal and nullifying the part that is illegal. It has no power to make a new assessment or direct its collection by the proper officer. It can obstruct, but it is hopelessly impotent to accomplish what is rightful to be done; and a court which has power merely to obstruct is always slow to proceed at all. There could not be a more striking illustration of the imbecility of this court, in such a cause as the present one, for any but an obstructive purpose, than was given the other day by the production at bar, and proffer to the court of the

coupons and silver that had been tendered by complainant for these taxes. How could we know which of the coupons were spurious and which were genuine; and, as to the former, how could we consent to become the depositories of contraband debentures. That some of the coupons are spurious is certified to us by the Legislature of Virginia in the recitals of the act of February 14, 1882, entitled an act to ascertain and declare Virginia's share of the public debt.

Suppose we assume jurisdiction of this suit, and also of others pending here, in which jurisdiction is claimed for us in all coupon cases whatever, under section 1979 of the Revised Statutes, and under chapter 137 of the Supplement to the Revised Statutes,—the court would become the depository of hundreds of thousands of dollars in the nominal value of these coupons, with no authority to do anything with them, and no jurisdiction to administer complete justice between the State of Virginia and the owners of them. The court should be slow to enter upon a proceeding which can end in no sound and perfect judicial result.

Passing from this obstacle to that complaint of the bill on which counsel lay the greatest stress, complainant avers that it had a right, under former laws of Virginia, which embodied contracts with her creditors, to pay the taxes now under consideration in such coupons of interest as were tendered in this case, and that it was prevented from doing so by the observance on the part of the State's revenue officers of the provisions of the act of Assembly of Virginia, passed January 26, 1882, (Acts of Assembly, 1881–'82, chapter 41, page 37,) which allow payment in gold, silver, and treasury, and bank notes only. Complainant denies the constitutionality of that act, and therefore prays that the officers seeking to collect taxes under it may be enjoined from so doing. The hearing of the
118 present motion for a preliminary injunction, based as it is on the question of the constitutionality of this act, is therefore equivalent to a final hearing on the merits of the bill.

The act of January 26th, 1882, now assailed, is auxiliary to that of January 14th, 1882, (Acts of 1881, '82, chapter 7, pages 10, 11, 12,) and must be considered in connection with it. The Supreme Court of the United States, in the case of Antoni *v.* Greenhow, has decided the act of January 14th to be constitutional, and has but a few days ago refused a rehearing of that case. We have, therefore, some firm ground to stand on. In order to a comparison of them, I will set out the substance of each of these acts. The Supreme Court described the act of January 14th as follows:

"Sections 1, 2, and 3, of the act of 1882, provide in substance that if coupons are tendered in payment of taxes the collector shall take and receipt for them for the purposes identification and verification. He shall then require payment of the taxes in money, and after marking the coupons with the initials of the name of the owner, shall deliver them to the judge of the county court of the county, or hustings court of the city, where the taxes are payable. The taxpayer may then file his petition in the county or hustings court against the Commonwealth to have a jury empaneled to try whether

the coupons are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. The Commonwealth may be brought into court by service of a summons on the Commonwealth's attorney. Upon this petition an issue and trial by jury is to be had, with ample privileges to all parties of exception and appeal. If the suit is finally decided in favor of the tax-payer, he is to have the amount paid by him for the taxes refunded out of the first money in the Treasury in preference to all other claims."

Of these clauses of the act thus set out in substance by itself the Supreme Court spoke, when it said: "A remedy which is ample for the enforcement of the payment of the money [which the act provides shall be refunded to the coupon holder by the State treasurer] is ample for all the purposes of the contract. That, we think, is given by the act of 1882 in both forms of proceeding." Thus we have the distinct and irreversible decision of the Supreme Court of the United States, that the remedy of the coupon-holder, afforded by the three first sections of the act of January 14th, 1882, is adequate, and that those three sections are ample to discharge the constitutional obligation of the State in respect to the remedy supplied to the coupon-holder. We come, therefore, to the act of January 26th, 1882, whose substance I will state.

That act, after requiring that nothing but gold, silver, United States Treasury notes, or national bank notes, shall be received for taxes, goes on to provide that "in all cases in which an officer shall take any steps for the collection of revenue claimed to be due the State from any citizen or tax-payer," such person, if he conceives the same to be unjust or illegal, or to be unconstitutional, &c., may pay the same under protest, and, on such payment, the officer collecting the same shall pay such revenues into the State treasury, giving notice to the treasurer that the same was paid under protest. It gives the protesting tax-payer leave, within thirty-days after such payment, under protest, to sue the collecting officer for the amount which has been paid, in "the court having jurisdiction of the parties and amounts."

If, in such suit, it be determined that the money was, for any reason going to the merits, wrongfully paid, and ought to be refunded, it provides that the court shall so certify of record, and that the auditor of public accounts shall issue his warrant for the amount, and that such warrant shall have preference of payment over the other claims upon the treasury, except such as have priority by
119 constitutional requirement. It provides that this shall be the only remedy "in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable [meaning in such funds only as are receivable] by said officers under this law, the same being other than and different funds than the tax-payer may tender or claim the right to pay."

It takes away from the tax-payer the remedy by injunction, supersedeas, mandamus, prohibition, and all other remedy than that of suing the tax collector as provided by this act. Observe that the clause just recited refers only to what occurs in cases of the com-

pulsory collection of revenue under the act of January 26th, and does not refer to what occurs in cases where the tax-payer comes voluntarily forward to pay, as contemplated by the act of January 14th.

The act goes on to make it misdemeanor, punishable criminally, for the collecting officer to receive other funds than gold, &c. After some immaterial provisions the act finally provides that no officer shall be subjected to any other suit than the one itself provides for any refusal on his part to accept payment of taxes in funds not authorized to be received by the act.

It will be observed that this act comes into operation only where the tax-payer "stands passive," and puts the State to the necessity of "taking steps for the collection of taxes due." It then forbids the receipt of coupons in payment, requires payment in gold, &c., and allows the coupon holder, after paying taxes in gold or other money, to sue the collector for the return of the money paid him. As before said, it allows him to pay under protest, and requires the collecting officer to notify the State treasurer of the protest. The suit may be brought in a State court, or if proper circumstances of jurisdiction exist, it may be brought in a Federal court; and the court may pass upon the validity of the tender of coupons, with reference either to the constitutionality of the act in forbidding the reception of them, or to the genuineness or spuriousness of the coupons tendered, or with reference to any other question going to the merits.

The fundamental error of complainant's counsel consists in assuming that this act of January 26th repeals that of January 14th. It evidently does not so in terms, but counsel insist that it does so by implication. On the contrary, I think that by necessary implication there is no repeal. The act of January 14th provides a means of availing of coupons in payment of taxes for "any tax-payer," "whenever he shall tender" to the proper collector "coupons detached from the bonds of the Commonwealth." This applies to every tax-payer. It grants him the remedy given by sections 1, 2, and 3, "whenever he shall tender" his coupons. He may make this tender at any time before "steps are taken" to collect his taxes coercively. He may make it after such "steps have been taken;" after he has brought suit against the collecting officer; and after the court in which he thus sues has passed favorably upon it.

On the other hand, the act of January 26th applies only to cases in which a collector of taxes has "taken steps" for their compulsory collection. The earlier act applies to voluntary tax-payers. The latter act applies only where the tax-payer has failed to avail of the remedy given by the earlier, and has slept upon his duty as to taxes until aroused by a levy upon his property for them. The act of January 14th covers cases where the tax-payer holds out his hand to pay the State. The act of January 26th covers where the State reaches forth her hand to collect from the tax-payer the tax which he neglects to pay. So far from conflicting with each other, these statutes go hand in hand, and are not only consistent,
120 but mutually assistant. The tax-payer who schemes for time and delay may, as complainant's counsel express it,

"stand passive" until the collecting officer approaches with his warrant of distraint. Aroused and coming forward, then, the tax-payer may pay in money under protest, and at once sue the officer for refusing coupons. If he succeed in his suit he will get back his money from the State treasurer, and still avail himself of his rights under the act of January 14th, for his taxes will still remain unpaid.

The act of January 26th does not, as complainant's counsel assert, take away "all remedies" from the tax-payers, against whom "steps have been" taken for compulsory collection. It only takes away injunction, mandamus, and the ordinary common law remedies. It leaves the right to petition under the earlier act, which the supreme court decides to be ample in its provisions for the enforcement of the tax-payers' rights in respect to the coupons; and it leaves the right to sue under its own provisions for the restoration of the gold, silver, or other funds, which have been paid under protest.

Nor does the act of January 26th deprive the tax-payer of the action of trespass against the collector for an illegal levy. It, in terms, only deprives him of the right of suing such collector for a "refusal on his part to accept in payment of the revenue" the coupons or other funds, not gold, &c., which he may have tendered.

The act affords no protection to Hamilton, the defendant, in this case, who made the levy on complainant's property, for no coupons have ever been tendered him or other funds contraband under this law, and the act only protects him from suit for refusing such funds.

I repeat that the act of January 26th does not repeal that of the 14th. It does not repeal expressly. It avoids to do so in terms, and it, by necessary implication, continues the earlier act in force, even reinforcing it by its own provisions. If it does not repeal the earlier act, then, even though it did not itself afford a remedy to the tax-payer, enabling him to exercise his constitutional privilege of paying his taxes in coupons, the Supreme Court has decided that the act of the 14th does afford an ample remedy; and it is not incumbent upon the State to afford more than one ample remedy for any right. If it afford no independent remedy, then the narrowest construction that can be put upon the act of the 26th is that it operates as a limitation, shutting off the right of the coupon holder to pay his taxes in coupons, if he neglects to avail himself of the remedy afforded by the act of the 14th, and "stands passive" until his property is distrained for taxes.

The State has a right, after providing for its creditor ample remedy for enforcing an obligation of contract, to require by statute of limitation a reasonably prompt exercise of that right, and this period may, in respect to public taxes, be measured by weeks or days. Therefore, even though the law of January 26th could be held to shut off the tax-payer from paying his taxes in coupons after steps have been taken for their coercive collection, still it is constitutional, and leaves the tax-payer all the remedy to which he is entitled.

But this law is more than one of limitation. It affords the tax-payer an additional remedy to that given by the act of January 14th. The Supreme Court of the United States has virtually so pronounced, for the act is drawn in language almost identical with that of Tennessee, which was construed by the court in Tennessee *v.* Sneed, 96 U. S., 69. It is a copy of that act. Its effect as to coupons is identical with that of the Tennessee statutes as to State bank notes, and the point made as to its constutionality is the same that was raised by Bloomstein and decided against him in that case.

And so it is that Virginia has put two acts upon her statute-
121 book, constitutional and affording remedy to the coupon holder. The act of January 14th has received the express sanction of the Supreme Court in Antoni *v.* Greenhow. The act of January 26th has received the court's equally emphatic sanction in Tennessee *v.* Sneed.

It is to be observed, furthermore, that the language of the clause of the act of January 26th, referring to the court in which a tax-payer may sue the tax collector, is broad enough to give jurisdiction to the Federal court, and to relieve this class of suits of the inhibition of the Eleventh Amendment. The clause confers the right to bring such suits in any court having jurisdiction of parties and amounts; so that, whenever the tax-payer is a non-resident, and the amount of taxes due equals or exceeds the sum of $500, a circuit court of the United States would seem to have jurisdiction. Indeed, the jurisdiction may embrace all cases included in the class defined in the first section of chapter 137, page 173, of the supplement to the Revised Statutes of the United States. In the present case the complainant company could have paid the taxes under protest to Collector Hamilton, and could then have sued this collector on the law side of the circuit court for the western district of Virginia in the mode prescribed by the act of January 26th.

If the statute gives the remedy at law in the Federal court, of course the tax-payer has no other: his remedy in equity being barred by the Eleventh Amendment and by the rule that where there is a remedy at law, equity can give none. The Supreme Court of the United States in Tennessee *v.* Sneed, construing precisely such a law, held that the act furnished a remedy to the tax-payer and did not impair the contract by taking away injunction and mandamus. The act nowhere seeks to confine the prosecution of the remedy to the State courts. If the amount and other circumstances of the case are such as to give Federal jurisdiction, nothing prevents the pursuit of the remedy at law in this court as freely as in all cases it may be pursued in the State courts. Such being the case, the very definition of equity, that "it is the correction of that wherein the law by reason of its universality is deficient," seems to forbid our allowing equity to be invoked in this case in which relief at law is adequate and complete.

Summing up what I have said on this act of January 26th, the Eleventh Amendment denies to complainant a remedy in the Federal court, unless the State of Virginia grants the right to be sued in that forum. If she grants that right in a particular man-

ner, no other manner can be pursued in exercising it. Having granted it in the manner prescribed by the act of January 26th, and that remedy being a remedy at law, complainant should have followed the method there prescribed; and, having been provided only with a remedy at law, complainant would have no right to resort to equity, even though the Eleventh Amendment did not bar its doors against him. Therefore, the proceedings in equity, which complainant has instituted here, cannot be maintained.

I will now pass on to the minor grounds of complaint relied upon in the bill, one of which is, that a penalty is inflicted by the second assessment on which the levies for these taxes were made; an increase of a third having been imposed in consequence of complainant's delay in paying the lesser tax first assessed. The fact that the second assessment, based as it was on a valuation of $20,000 per mile, proved to be greater than the first, is an accident which arose out of the peculiar circumstances attending the valuation of these particular roads. The act of April 22, 1882, requires the board of public works to make the first assessment from "the best and most reliable information that can be procured;" and is, in all other
122 respects, silent as to the rate of valuation at which this first assessment shall be made. It nowhere requires, indicates, or implies that this assessment shall, in all cases, be at a rate of valuation less than $20,000 per mile. The board of public works is required to make it from the best and most reliable information at hand. The board may make it the rate of $15,000 or $150,000 per mile, so far as the law is concerned; but whether the first assessment be made on the basis of fifteen, or one hundred and fifty, or forty, or ten thousand dollars a mile, if the company assessed fail to pay the tax resulting, within sixty days, then the act requires that a second assessment shall be made by the auditor, and fixes the arbitrary valuation of $20,000 a mile as the basis of it.

This provision of law is not penal, either in its terms, its spirit, or its legal effect. The only ground on which the second assessment is open to objection, with reason, would be, that the valuation of $20,000 is excessive. This is not alleged by the bill. It is notorious that such an averment could not be made with truth; and the bill refrains from making it. The assessment is strictly legal and is not penal. By the accidents of this case the second was larger than the first assessment, and a mere hardship has resulted; resulted too from the laches of the complainant. Equity does not relieve from hardship of this sort, which a reasonable diligence on the part of the complainant could have averted. *Vigilantibus non dormientibus* is applicable here. Self-imposed burdens are not grounds for equitable relief.

Other of the minor complaints of the bill are urged in conformity with the ruling of the Supreme Court of the United States in Hannewinkle *v.* Georgetown, 15 Wal., 547, in which the court held that a bill to restrain the collection of a tax cannot be maintained on the sole ground of the illegality of the tax, but required that there should be either an allegation of fraud, or that the tax sale would bring a cloud upon title, or that a multiplicity of suits would be

prevented, or that some other cause presenting a case for equitable relief existed.

The bill, with industrious fidelity, conforms to every suggestion of the court in this case, alleging *seriatim* each of the grounds expressly named, and reinforcing these with other grounds numerous enough to satisfy the most exacting requirements in that regard. It charges fraud upon the officers of the State in the assessment of this tax. It sets out no facts creating a presumption of fraud, and throwing upon the officers the burden of rebutting its allegations, but employs only general averments. The first assessment upon the four railroads was made by the board of public works, at the rate of $15,000 a mile "from the best and most reliable information that could be procured." This was in strict compliance with the direction of section 20 of the act of April 22, 1882. The tax not having been paid within the period prescribed, the auditor, in strict compliance with the same law, made the second assessment at the rate of $20,000 a mile. The latter proceeding was expressly, positively, and peremptorily required by law, and the officer would have been derelict in duty, and would have subjected himself to the imputation of fraud, if he had not made the assessment. A third officer was deputed, in exact conformity with the same law, to collect, and took the steps for collecting the tax, in doing which, this court had obstructed him. Now, the presumption is always in favor of the regularity and validity of the conduct of officers engaged in the performance of their official duties, and equity will not enjoin them upon general averments that the assessment was too high.

Indeed, in all cases in which fraud is relied upon, the especial facts constituting the fraud must be set forth. Distinction must also be taken between cases in which there is an entire absence of authority in law on the part of taxing officers, and cases of mistaken or wrongful execution of powers conferred by law;
123 and the rule is that where the officers act under valid authority, and acts within its limits, he will not be enjoined, although errors may have occurred in the exercise of the power conferred. In the case before us these conditions are not supplied, and the averment of fraud is untenable.

Another complaint is that the levies made upon complainant's property, and the sales of it advertised, create a cloud upon the title of the real estate of the four railroad companies, for the taxes due from which the levies were made. If the companies owning those railroads were themselves before the court as parties to the bill, the court could hear this complaint; but coming as it does from a complainant which expressly disclaims title in the real estate referred to, it cannot be entertained. Besides, this doctrine of cloud of title applies only in cases where real estate is to be sold, and sold under proceedings which are in fact illegal, but which do not show the illegality on their face. It applies only where a court is about to sell an illegal title to real estate, and where the illegality is not to be found in the record of its proceedings. Here it is not real estate, the sale of which is sought to be enjoined, but personalty, and the objection is untenable.

It is also complained that a multiplicity of suits will result from the sale of this property for these taxes. The bill does not set out with any precision *how* such a result will follow. It is certain that no multiplicity of suits yet exists. The better doctrine on this subject is, that the mere apprehension of suits not yet brought will not justify the interference of equity. In general, injunction of one suit is only granted where a multiplicity of suits are actually pending, all of the same character, and involving the same question of law. The bill refers to suits about to be instituted by the other railroad companies of the State, involving this right to pay taxes with coupons; but none of them have been instituted, and the proof is that all the companies but this complainant have paid their taxes in money. Therefore, as to other railroad suits, even the apprehension of them is wanting.

As to the liability of the complainant company, as trustees for its stockholders, to actions by them for taxes, paid in money, or by sale of property, which it has voluntarily tendered in coupons, the vague apprehension of suits so improbable and remote, and which would be so untenable if brought, is not worthy of the consideration of the court. So of the equally vague apprehension intimated in the bill, of suits that might be brought against complainant as a common carrier, in consequence of its failure to serve the public effectually, because of a temporary subtraction from its rolling stock of some sixty freight cars and a locomotive. The probability of a great company, owning thousands of freight cars, and probably thousands of locomotives also, being sued for breach of its contracts as a common carrier, by reason of so diminutive a loss of rolling stock, is too remote to be considered by the court, especially as it is not averred that a single suit of the kind has yet been brought.

It is also complained that the treasurer of Augusta county, John E. Hamilton, one of the defendants, who, or his deputy, made the levies, and the seizures of property in this instance, is not pecuniarily responsible for a wrongful sale of this property in the damages that might be recovered from him in trespass; his assessed estate being only of the value of some $4,500. The argument of the bill on this head is, that as this same defendant was about to make similar levies on the property of other railroad companies the damages accruing to all would exceed any possible assets which he might possess for the satisfaction of them. But the proof in the case is, that all the other railroad companies have paid the taxes due from them. There is no possibility therefore of any such suits, and the premises of the bill are at fault in this particular. It does not
124 appear that Hamilton will be sued for any other seizures than those made in this case, and as it appears that he guided himself in his action by the direction of the law under which he was acting, his liability is covered by his official bond, which was stated at bar to have been given in the penalty of $200,000. The danger of loss to the complainant in this direction is not, therefore, so probable as to be worthy of the court's consideration in the present case.

The complaint just mentioned is made in aid of another complaint of the bill, that irreparable injury will be inflicted upon the

complainant by the sale of the property under seizure. The Baltimore and Ohio Railroad Company is too wealthy and powerful to be irreparably injured by these seizures, except, comparatively speaking, to a most diminutive extent. The injury could have been averted in the first instance by taking the steps pointed out by law for verifying the coupons with which the complainant sought to pay the taxes—a law recently pronounced valid by the Supreme Court of the United States. Even now the measure of irreparable injury threatened is that which would result from first tendering the coupons and advancing the amount of the taxes in money, and then obtaining a reimbursement of the money advanced by having the coupons verified according to law. Any injury with which it is threatened is reparable by the procedure instituted, which the court is bound to consider as having been provided in good faith. The court, therefore, must disregard complainant's apprehension of an irreparable injury which seems to have been self-imposed.

A sale of complainant's property by due process of law for the satisfaction of taxes, which may be avoided by complying with a law which, however onerous it may be in respect to men of small means, who are required to verify very small amounts of coupons, yet subjects holders of large amounts to neither an onerous nor an unreasonable proceeding for verification, cannot be regarded as inflicting an irreparable injury either practically or theoretically.

Still another complaint of the bill is the interruption which the seizure of its rolling stock is alleged to produce in the performance of complainant's duties to the public as a common carrier. If the four companies owning these local railroads were complainants, and if they owned only the quantity of rolling stock properly belonging to short local roads, these seizures might be really amenable to the complaint of the bill in this particular. But the complainant is one of the most wealthy railroad corporations in the world, having unlimited command of all the appliances and instrumentalities for conducting the immense business of its main stem and the auxiliary roads under its control. Its operations are on so large a scale as to be part of the public history of the times, and the court may take judicial cognizance of the amplitude of its resources as to rolling stock. It is hardly possible to believe that the complainant's power to serve the public as a common carrier is appreciably affected by the, to it, inconsiderable levies made by Hamilton, the defendant in this case; and this complaint is untenable.

All these minor complaints seem to me to be frivolous, and hardly worthy of the serious attention I have given them. They certainly are not sufficient to justify an injunction against the collection of public taxes.

What the circuit judge may do with this motion I know not; but, presented to me, sitting alone, as it now is, I think the case is ruled by Antoni *v.* Greenhow and Tennessee *v.* Sneed; and I am constrained to deny the motion for a preliminary injunction.

A few days after this decision was rendered, the circuit judge, Hon. Hugh L. Bond, granted the motion for a preliminary injunc-

tion, basing his action upon reasons set out in an opinion filed in the cause.

I, W. B. Lurty, clerk United States circuit court for the western district of Virginia, do hereby certify that the foregoing is a true copy of the record in the cause of the Baltimore and Ohio Railway Company against S. Brown Allen, auditor of Virginia, and others, in chancery.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court at Harrisonburg, in said district, on this 18th day of February, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 107th year.

[SEAL.] W. B. LURTY,
Clerk U. S. Circuit Court, Western District of Virginia.

Endorsed on cover: Virginia, western district, C. C. U. S. No. 826. S. Brown Allen, auditor of public accounts of Virginia, *et al.*, appellants, *vs.* The Baltimore and Ohio Railroad Company. Filed 4th March, 1884.

114-311

In the Supreme Court of the United States.

MARCH, 1884.

S. BROWN ALLEN, Auditor of Public Accounts of Virginia, *et. al.*
vs.
THE BALTIMORE AND OHIO R. R. COMPANY. } No. 826.

BRIEF OF ATTORNEY-GENERAL F. S. BLAIR FOR APPELLANTS.

In the Supreme Court of the United States.

S. BROWN ALLEN, Auditor of Public Accounts of Virginia, *et. al.*
vs.
THE BALTIMORE AND OHIO R. R. COMPANY.
No. 826.

BRIEF OF ATTORNEY-GENERAL F. S. BLAIR FOR APPELLANTS.

STATEMENT.

The appellee corporation owed the State of Virginia certain taxes on account of its branch roads leading from Winchester, in Virginia, to Staunton, in Virginia, and tendered payment of said taxes to the State collecting officers in coupons detached from the bonds of said State, issued under the Funding act of 1870-71; which said coupons the said State refused, because said coupons had not been verified by the verdict of a jury and the judgment of a court to be genuine, in accordance with the requirements of the acts of 14th Jan., 1882, and 26th Jan., 1882, found in Acts 1881-82.

The State, through the county treasurer of Augusta county, proceeded to levy and sell the property of the said company, and the latter obtained an injunction, out of the Circuit Court of the United States for the Western District of Virginia, to restrain said levy and sale of said property.

The appellants all appeared and demurred to and answered said bill; and, on hearing, said injunction was perpetuated.

THE LAW.

The demurrer to said bill should have been sustained:

a. Because the suit was indirectly one against the State, and hence *cannot be maintained.* (Louisiana *vs.* Jumel, 107 U. S. R.,

711; Antoni *vs.* Greenhow, 107 U. S. R., 769; Cunningham *vs.* Macon and Brunswick R. R., 109 U. S. R., 446, and cases therein cited.)

b. Because the coupons tendered by appellee had not been verified as required by the statute laws of Virginia, found acts 14th Jan., 1882, and 26th Jan., 1882.

These acts required the verification and identification of said coupons as genuine by the verdict of a jury and the judgment of a court before they could be received in payment of taxes, and this honorable Court, in Antoni *vs.* Greenhow, *ubi supra*, declared the remedy furnished by said acts to be adequate.

By an act of the General Assembly, approved January 14, 1882, chapter 7, page 10, Acts of 1881–82, it was prescribed and enacted that, to prevent frauds upon the Commonwealth and holders of her securities in the disbursement of her revenues, before any tax-payer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the Commonwealth, any papers or instrument in print, writing or engraving purporting to be coupons detached from the bonds of the Commonwealth, issued under the act of 1871, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering them a receipt, stating that he has received the same for the purpose of identification and verification. The act further requires that the tax-payer at the same time shall pay his taxes in coin, legal-tender notes, or National bank bills, and upon the payment thereof the collector or receiver of taxes shall give him a receipt for the same; and the act in express terms further declares that in case of refusal by the tax-payer to pay in coin, legal-tender notes, or National bank bills, the taxes due shall be collected as all other delinquent taxes are collected. It further provides that the coupons so received from the tax-payer shall be marked with the initials of his name on the same, and, being securely sealed up, shall be delivered to the judge of the County Court or Hustings Court of the city; and the mode of procedure is defined in detail, which, in brief, requires that every tax-payer shall, by the verdict of a jury empanelled in said courts, prove, identify, verify, and establish such coupons to be genuine and

legally receivable for taxes. And it is only when the judgment of the court aforesaid, in conformity to such verdict, that the coupons are genuine and legally receivable for taxes is certified to the treasurer, that he has any right to receive said coupons for taxes. He then must receive said coupons and refund to the tax-payer the money which he has before paid for his taxes.

This act was passed because the country was flooded with spurious, stolen, or forged bonds and coupons, made in the similitude of genuine ones, and to protect the revenues of the State as well as the *bona fide* bondholders, and for the purpose of enforcing the contract created between the Commonwealth and her creditors by the Funding act of 1870-71.

The pretended tender, by Messrs. Sheffey & Davis, of the taxes due by the said four roads was in nowise a compliance with the coupon act of the 14th of January, 1882, because the coupons offered by them had not been verified and ascertained to be genuine by the verdict of a jury and the judgment of a court, and so certified to the State Treasurer; nor did they pay or offer to pay the said taxes in coin, legal-tender notes, or National bank bills, and it was for these very reasons that respondents, the Auditor and Treasurer and Mr. Glenn, the cashier of the State depository aforesaid, refused to accept these unverified and unproven coupons. In response to the offer of production by complainant of his coupons aforesaid to that honorable Court, respondents reply that the law has designated the County and Hustings Courts as the proper tribunals to establish the verity of coupons. They have several plain, adequate, and complete remedies at law, if entitled to redress, in the foregoing record.

Injunction will not lie to restrain the commission of a pure, simple and naked trespass, as is the case here, if any wrong at all has been done by the respondents; for, if an officer holding a tax assessment for the collection of taxes assessed against one man, levies said assessment on the property of another man, the latter has his remedy by action against the officer for damages. The appellee seems to have been aware of this doctrine, and therefore they have sought to bring this case within some of the other branches that attach jurisdiction, in the collection of taxation, to courts of equity. They have charged that the said

assessments and levies amount to a fraud on appellee, cast a cloud on the title to the property, as well as an incumbrance thereon, and that the sale would produce irreparable damages to said railroad property.

"When relief is in equity, the principle that courts of equity do not give relief when there is a plain and adequate remedy at law, applies as well to tax-cases as others. Where the injury complained of arises from the erroneous action of the tax-officers, the statutes usually provide a remedy for the correction of such errors by appeal to some statutory tribunal, or, when none is provided, then the remedy is by *certiorari* to review the proceedings in some court of general jurisdiction. If the matter complained of is such as to render the action of the tax-officer illegal and void, then he is a trespasser, and there is a complete remedy at law. When the officer is about to sell real or personal property for the non-payment of a tax, courts of equity will not restrain his action on the ground that the tax is illegal and void, whether the illegality results from the fact that the person or his property is not liable to tax, or for any defect in the tax-proceedings appearing on their face. If the property levied on is personal, the remedy is trespass; if real estate, the defence is complete in ejectment."

"When the power of the corporation to impose the tax is admitted, the same rules will apply to the jurisdiction of a court of equity to give relief, as in the case of State taxation. The case must be brought within some of the ordinary grounds of equity, such as a cloud upon the title to real estate, fraud, or multiplicity of suits. But there is a broad distinction between taxes levied by a State and taxes levied by a municipal corporation. The Legislature has the inherent right to levy taxes, and the courts will not interfere with the collection of the tax except under peculiar circumstances, but will leave each tax-payer to assert his rights in the courts." State Railroad Tax Cases, 92 U. S. R., 613–617; Dow *vs.* Chicago, 11 Wall., 108; Hennewinkle *vs.* Georgetown, 15 Wall., 547.

The tender of coupons in this case was bad, because they had not been established to be genuine, as before stated. The tender of a verified coupon would be a good tender, but not so of such as were unverified.

The reasonableness of this act was sustained in Antoni *vs.* Greenhow, 107 U. S. R., 769.

A State has absolute control of the remedy, but not of the obligation of the contract. The latter is beyond the reach or control of the Legislature. (See Sedgwick on Construction of Constitution and Statutes, 581-590, 2d edition, Pomeroy's notes.)

I shall rely on the opinion of District-Judge Hughes, in the court below, in this case, as a complete argument against the jurisdiction of the Federal Court to entertain such a case, in the light of the Virginia statutes affording ample remedy for coupon-holders.

While there are many questions of fact involved in this case, the material, legal issue presented the Court, is whether unverified coupons can be enforced in payment of the taxes of the State of Virginia, and in case of the refusal of her collecting-officers to receive them, can they be perpetually enjoined from levy and sale? We think we have sufficiently proven the contrary by the authorities shown.

F. S. BLAIR,
Attorney-General of Virginia.

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114-311

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1884.

No. 826.

S. BROWN ALLEN, *Auditor of the Public Accounts of the State of Virginia, et. al.*, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR APPELLEE.

HUGH W. SHEFFEY,
JOHN K. COWEN,
HUGH L. BOND, JR.,
Of Counsel.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1884.

No. 826.

S. BROWN ALLEN, *Auditor of the Public Accounts of the State of Virginia, et. al.*, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Appellee.*

BRIEF ON BEHALF OF THE APPELLEE.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Virginia, making perpetual an injunction theretofore awarded at suit of the appellee against the appellants, restraining them from proceeding to collect certain taxes by sale of the appellee's property.

STATEMENT OF THE CASE.

The Baltimore and Ohio Railroad Company was the lessee of the three railroads in the State of Virginia, styled respectively the Winchester and Potomac, the Winchester and Strasburg, and the Strasburg and Harrisonburg.

The Baltimore and Ohio Railroad Company also furnished rolling stock for hire to the Valley Railroad Company, which had none of its own. (See Agreement of counsel, pp. 43 and 44 of Record).

The act of Virginia entitled "An act for the assessment of taxes on persons, property, income and licenses, and imposing taxes thereon for the support of the government and free schools, and to pay the interest on the public debt," approved April 22d, 1882, regulated the assessment and taxation of all property for state purposes. Sections 20 and 21 of that act (Record, pp. 34 and 35), provided for the assessment and taxation of railroad and canal companies. In accordance with the provisions of those sections, the Treasurer of the Baltimore and Ohio Railroad Company made the required report for the year 1882, of the property and earnings of each of the railroads leased by it; and the Treasurer of the Valley Railroad Company made a like report for it. These reports were filed as exhibits with the appellants' answer, and will be found at pages 29 to 34 of the Record.

Section 20 of the Act of April 22, 1882, provides, that "upon the receipt of every such report it shall be the duty of the auditor of public accounts to lay out the same before the Board of Public Works, who shall after thirty days' notice, previously given, &c., proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured, and to this end shall be authorized and empowered to send for persons and papers, should it be deemed necessary. A certified copy of the assessment, when made, shall be immediately forwarded by the Secretary of the Board, to the President or other proper officer of every railroad or canal company so assessed, whose duty it shall be to pay into the Treasury of the State within sixty days after the receipt thereof, the tax which may be imposed thereon by law."

The tax imposed by law is that imposed by the 21st Section of the same act, to wit: Forty cents on every one hundred dollars of the estimated value.

In accordance with these provisions, each of the railroads above named was assessed at $15,000 per mile, and taxes were levied upon each as follows:

The Winchester & Potomac,	$703.72
The Winchester & Strasburg,	1,144.00
The Strasburg & Harrisonburg,	2,970.40
The Valley Railroad Co.,	1,593.04

The certified copies of these assessments by the Board of Public Works were received by John W. Davis, Assistant to the Vice-President of the Baltimore and Ohio Railroad Company, January 17, 1883.—(See Agreement of counsel, page 44 of Record).

It thereupon became the duty of the Baltimore and Ohio Railroad Company to pay into the Treasury of the State within sixty days the tax imposed on each of the railroads leased by it; and of the Valley Railroad Company to pay in like manner the tax imposed on it.

The mode of paying into the Treasury of the State is prescribed by Section 7, of Chapter 43, of the Code of Virginia, of 1873, page 410, 411, as follows:

"All moneys to be paid into the Treasury of the State shall be paid by the person liable to pay the same, or his agent, into one of the banks in the City of Richmond, in the following manner: A warrant shall be obtained from the Auditor of Public Accounts, or the Second Auditor, as the case may be, directing the Treasurer to receive the sum to be paid; the Treasurer shall, by his order upon the said warrant, require the cashier of one of the said banks to receive the sum therein mentioned; and, upon receiving the same, the proper officer of the bank shall give a certificate on the same warrant, that the said sum has been paid into such bank to the credit of the Treasurer. Upon the return of the warrant, order and certificate, the Treasurer shall give a receipt for the sum so paid; and upon the same being delivered to the Auditor,

who may have issued the warrant, he shall grant a receipt therefor."

On the 16th of March, 1883, within sixty days from the receipt of the notices of assessment aforesaid; the appellee pursuing the course prescribed in the Section of the Code above quoted, sought to pay into the treasury of the State the sums payable by it as taxes on its leased lines of railroad, in matured interest-coupons from bonds of the State, issued under the act, entitled "An Act to Provide for the Funding and Payment of the Public Debts," approved March 30, 1871, and in silver coin in amounts for which that coin is a legal tender. A like tender was made on the same day by the Valley Railroad Company. The mode of tender is shown in full by the several "Warrants to pay in," and indorsements thereon to be found at pages 13 to 15 of the Record, and by the schedules of coupons tendered, and summary of tenders, printed in the Record, at pages 16 to 18. Copies of two of the coupons will be found at page 19 of the Record.

The coupons tendered are admittedly genuine tax-receivable coupons from bonds issued under said act of March 30, 1871.—Item *Second*, agreement of counsel, Record pp. 42–43.

The several tenders were made to the State Depositary, the Treasurer and the Auditor, in turn, and each refused to receive the coupons, or to give a receipt therefor.

The twentieth section of the act of April 22, 1882, after providing for the payment into the State Treasury within sixty days as above quoted, provides further, that "A company failing to make such report, or to pay the tax assessed upon its property, shall be immediately assessed, under the direction of the Auditor of Public Accounts, by any person appointed by him for the purpose, rating their real estate and rolling stock at twenty thousand dollars per mile, and a tax shall at once be levied on such

value at the annual rate levied upon the value of the other property for the year. Such tax so levied, as well as the sum required to be paid upon the report hereinafter" (hereinbefore) "mentioned, if the same be not paid at the time provided herein, shall be collected by any treasurer to whom the Auditor may deliver the assessment, or a copy thereof. The treasurer may distrain and sell any personal property of such company, and shall pay the taxes into the Treasury within three months from the time of the assessment or a copy, as aforesaid, may be delivered to him."

It was to restrain the appellants from enforcing these last quoted provisions against the appellee and its property, to collect the taxes in payment of which the tenders already described were made, that the injunction was awarded by the Circuit Court.

Subsequent to the making of the tenders of coupons and coin, the appellant, S. Brown Allen, Auditor of Public Accounts, caused the assessed value of each of the railroads named to be increased from $15,000 to $20,000 per mile. Copies of these increased assessments were placed in the hands of the appellant, John Ed. Hamilton, for collection. The latter seized the appellee's property and proceeded to sell the same for taxes, as follows:

March 22d, 1883, for taxes due from the Valley Railroad Company, he levied upon twenty-four cars belonging to the appellee, and then standing on the track of the Valley Railroad Company in Staunton.

March 23d, 1883, for a part of the taxes payable by the appellee as lessee, he levied upon twenty-two cars belonging to the appellee, and then in the city of Winchester; and on the same day for part of those taxes, he levied upon a locomotive engine and fifteen cars belonging to the appellee, and then at Harrisonburg.

The appellee thereupon filed its bill of complaint against

the appellants in the Circuit Court of the United States. Bringing into court the coupons and silver coin that have already been tendered in payment of the taxes imposed on the several railroads for the year 1882, the complainant asks that it be adjudged and decreed, that the tax assessed by the Board of Public Works upon the real and personal property held by the complainant as lessee, and upon the property of the Valley Railroad Company, has been and is by such tender of money and coupons and the bringing the same into court, paid, satisfied and discharged; that the so-called assessments made under the direction of the Auditor of Public Accounts, and the attempted levy of the tax thereunder and all acts in respect thereto were and are wholly null and void; and that the respondents be enjoined from taking any steps or proceedings for the collection of any of the taxes or alleged taxes referred to, and from distraining or selling any property of the complainant therefor.

ARGUMENT.

1.—The Effect of the Tender of Coupons in Payment of Taxes.

A.—The effect of tender by the tax-payer is to extinguish the lien of the levy, and to render illegal and void all subsequent proceedings for the collection of the tax.

That a tender of the amount due for taxes is equivalent to payment, in preserving the rights of the tax-payer, has been held by this court in a series of cases, in reference to taxes levied by the United States.—Cooley on Taxation, p. 323; Bennett *vs.* Hunter, 9 Wall. 329–338; Tacey *vs.* Irwin, 18 *id.* 549; United States *vs.* Lee, 106 U. S. 196.

If a tax-payer tender the amount due, there is no default, and in a proper case subsequent proceedings to collect the tax will be restrained by injunction. Litchfield *vs.* County of Webster, 101 U. S. 773, 780.

In the cases cited the tender was in lawful money of the United States. Is the tender of the coupons in the present case less effectual? These coupons were attached to bonds issued under the act of Virginia of March 30, 1871, and by that act were made "receivable at and after maturity for all taxes, debts, dues and demands due the State." They express on their face that they are receivable for taxes. "The Supreme Court of Appeals of Virginia decided, at its November term, 1872, in the case of Antoni *vs.* Wright, 22 Gratt., 933, that in issuing these bonds the State entered into a valid contract with all persons taking the coupons to receive them in payment of taxes and State dues, and that the act of 1872, so far as it conflicted with this contract was void. The authority of this case was recognized in Wise *vs.* Rogers, 24 Gratt., 169; and in Clark *vs.* Tyler, 30 Gratt., 137, decided in 1878, it was said: 'This decision of Antoni *vs.* Wright * * * must be held to be the settled law of this State.' The same questions were decided in the same way here at the October term, 1880, in Greenhow *vs.* Hartman, 102 U. S., 672, and are no longer open in this Court. Any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders."—Antoni *vs.* Greenhow, 107 U. S., 770, 771.

"The right of the coupon holder is to have his coupon received for taxes when offered."—*Id.*, 775. This right is secured by the Federal Constitution. How then can the tender of coupons in the present case be less effectual than was the tender of money in the cases we have cited? The tender of the money was equivalent to payment because the statutes of the State or United States, levying the

tax, made that money the medium of payment, and gave the tax-payer the right to have it received. The tender of the coupons in the present case must have the same effect, because the contract of the State secured by the Federal Constitution has made them the medium of payment, has given the holder the right to have them received when offered. The legislature of Virginia can pass no act for the collection of taxes that does not make coupons one of the media of payment. Whatever the terms of the act, the Federal Constitution reads into it the clause, "the taxes levied by this act shall be payable in coupons." Take the present case for illustration. The appellee tendered coupons and silver coin. It is admitted that under the decisions we have cited, if the appellee had tendered the full amount of taxes in lawful money of the United States, its tender would have been effectual to discharge the tax. Why? Because the Act of April 22, 1882, by implication made that money receivable for taxes levied under it. But the Federal Constitution, acting on the contract of the State, made the coupons receivable for those taxes. How then can the tender of the coupons be held to be less effectual than the tender of money? The answer made to this reasoning is, in effect, that the State's contract is not that the coupons shall be a legal tender for taxes, that the coupon-holder's right is not "to have his coupon received for taxes when offered;" but this right has, by subsequent legislation, been qualified, that is, changed, and that qualification or change, has been pronounced by this court to be constitutional. This, we submit, is not the case.

B.—Bearing of the Virginia Acts of January 14th and 26th, 1882, on this point.

The act entitled "An act to prevent frauds upon the commonwealth and the holders of her securities in the collection and disbursement of revenues," approved

January 14, 1882, was before this court in the case of Antoni *vs.* Greenhow, 107 U. S. 769.

The act entitled "An act to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt," approved January 26th, 1882, was framed by joining in one the two acts of Tennessee which were before this court in the case of Tennessee *vs.* Sneed, 96 U. S., 69.

The question whether the later act repeals the earlier will be discussed presently. For the purposes of this argument we shall treat both as still in force.

Sections 1, 2, and 3 of the act of January 14th, provide in substance, (1) that whenever a tax-payer tenders coupons, the collector shall receive them, giving the person tendering a receipt stating that the collector has received them for the purpose of identification and verification. (2) He shall at the same time require the tax-payer to pay his taxes in coin, legal tender notes, or national bank bills, and upon payment give him a receipt for his taxes. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected. (3) The collector shall mark each coupon and deliver the same to the judge of the county or hustings court. The tax-payer shall thereupon be at liberty to file his petition in said court against the commonwealth. The petition shall allege that he has tendered certain coupons in payment of his taxes, &c., and pray that a jury be impanneled to try the question as to whether they are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. Upon this petition issue shall be joined, and trial by jury had, with right of appeal, &c. If it be finally decided in favor of the petitioner, that the coupons tendered by him are genuine, legal coupons, receivable for taxes, &c., then the judgment of the

court shall be certified to the treasurer, who upon receipt thereof, shall receive said coupons for taxes, and shall refund the money before then paid for his taxes by the tax-payer, out of the first money in the treasury in preference to all other claims.

The clear intention of this act is to take away the right of the coupon-holder, to have his coupon received for payment of taxes *when offered*. If valid, it destroys entirely the legal tender character of the coupon. Section 2 provides expressly that after tender of coupons the taxes shall still be due, and unless paid in coin, legal tender notes, or bank bills, shall be collected as delinquent. The only right or advantage that the tax-payer gains by tendering his coupon, is the right to proceed by petition under Section 3.

If this act is valid, the coupon-holder's right is no longer "to have his coupon received for taxes when offered," but it is to have his coupon received after tender, payment of taxes in money and judgment of court obtained and certified to the treasurer.

The appellants allege in their answer that the act of January 14th does change the coupon-holder's right in the way we have stated, and further that the case of Antoni *vs.* Greenhow decides that such a change does not impair the contract. The proposition is, that a contract which secures the right to have one's coupon received when offered, is no more valuable than a contract which secures the right to have one's coupon received after tender, after payment of the face value of the coupon in money, and after a tedious proceeding at law, ending in a certificate of judgment and a warrant on the treasury for the return of the money paid months or years before, without interest. The decision of this court in the case of Antoni *vs.* Greenhow is cited as authority for that proposition.

Now especial pains were taken in the opinion of the

court in that case, to negative any such inference from the decision.

"The right of the coupon-holder is to have his coupon received for taxes when offered. The question here is not as to that right, but as to the remedy the holder has for its enforcement when denied. At the time the coupon was issued there was a remedy by mandamus from the Supreme Court of Appeals to compel the tax-collector to take the coupon and cancel the tax. This implied a suit, with process, pleadings, issues, trial and judgment. No restrictions were placed on the defences the collector could make. He might raise such issues as he chose. Without the aid of some restraining power, the mere pendency of the suit would not prevent the collector from proceeding according to law with the collection of the tax.

He might, if he went on, subject himself to liability for damages, if the tender was one he ought to have accepted, but there was nothing to prevent his going on if he chose to take this risk." "The tax-collector could not be compelled to accept the coupon and discharge the tax until final judgment."

"In conclusion, we repeat that the question presented by this record is not whether the tax-collector is bound in law to receive the coupon, notwithstanding the legislation which, on its face, prohibits him from doing so, nor whether, if he refuses to take the coupon, and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons. We decide only the question which is actually before us." "What we are called upon to consider in this case is not the refusal to take the coupons, but the remedy after refusal."

The court thought that the remedy given by sections 1, 2 and 3 of the Virginia act so far accomplished the ends that could have been attained by *mandamus* as it existed at the date of the contract, that the substitution of the former remedy for the latter did not impair the obligation of the contract. But the court did not decide that the remedy provided by those sections was sufficient to enforce all the coupon-holder's rights under his contract, and that therefore his rights were to be measured by that remedy. On the contrary, the court took pains to point out that the coupon-holder's right to have his coupon received when offered was one that could not be enforced by *mandamus*. The new remedy was held to be a valid substitute for the old, not because the new remedy was sufficient to enforce all the rights of the coupon-holder, but because it was thought substantially sufficient to enforce such of his rights as could have been enforced by the old remedy.

The decision in Antoni *vs.* Greenhow then is no authority for the appellants' proposition.

The decision in Greenhow *vs.* Hartman is still the law; and the act of January 14th, so far as it forbids the receipt of these coupons when tendered and renders the tender of no avail by requiring the collector to proceed to collect the taxes as if still due and delinquent,—so far, that act is a violation of the contract and void.

The counsel for the appellants contends that the act of January 14 imposes on the coupon-holder and taxpayer, as a condition precedent to the State's obligation to receive the coupon for taxes, the duty of verifying it as a genuine, tax-receivable coupon, by following the course prescribed in that act; and that until the coupon is so verified, the tender of it to the collector is of no avail. That to engraft such a condition precedent on a contract which is in terms an unqualified promise to receive at and

after maturity, is to impair the obligation of that contract, seems too plain for argument. It may be conceded that the State would be entitled to take reasonable precautions against the receipt of spurious coupons; but the requirements of this act, if regarded as such precautionary measures, would be unreasonably onerous, even if the act did not directly deprive the coupon-holder of his right to set-off or tender. We have already shown that the act does destroy entirely the legal-tender character of the coupons.

For an example of a reasonable and perfectly adequate measure of precaution to prevent the receipt of spurious coupons, we may refer to the act of Virginia, entitled "An act imposing certain duties upon county and corporation treasurers and other collectors of State revenue, and fixing the penalty for failure to perform them," approved February 8, 1879, which provides, that "it shall be the duty of said treasurers and other collectors, upon receipt of any taxes, debts, &c. due the State, when the same or any portion thereof is paid in coupons, to require the person paying said taxes, &c., to endorse his name and that of the tax-payer and date of payment upon the back of said coupon."

Much that we have said in regard to the act of January 14th will apply to the later act of January 26th. This later act does not seek to engraft onerous conditions precedent on the contract to receive the coupons. It forbids absolutely the receipt of coupons for taxes. So far it is clearly void. Its provisions in reference to the tax-payer's remedies in cases where coupons have been refused and steps taken to enforce payment, will be considered presently.

It is submitted that the effect of the tender of coupons in payment of taxes is to extinguish the lien of the levy, and to render illegal and void all subsequent proceedings for the collection of the tax.

2.—Remedy of the Tax-Payer whose Tender of Coupons has been Refused.

A.—Remedy by mandamus or action in the nature of a mandamus.

After making a tender which has been refused, the tax-payer may either proceed to compel the acceptance of his tender, or rest upon his tender, and await the action of the collector. If he undertakes to compel the collector to accept his tender and discharge the tax, his proceeding will be by *mandamus* or action in the nature of a *mandamus*. The scope of this remedy by mandamus is described in the passages we have quoted from the opinion of the court in the case of Antoni *vs.* Greenhow. The efficacy of the tender as the equivalent of payment cannot be maintained by this remedy. When final judgment is obtained against the collector, he will be compelled to accept the tender. Until final judgment he is free to proceed according to law to collect the tax.

The remedy provided by sections 1, 2, and 3 of the act of January 14th. which that act made the substitute for *mandamus* in Virginia, is an action in the nature of a *mandamus*. It is in substance a suit against the commonwealth to enforce the payment of the coupon. True, the form of the final judgment is that the coupon be received for the taxes and the money repaid, but this is the merest form. The taxes must have long ago been paid in money, and what the petitioner really obtains by the judgment is the payment of the face value of his coupons. "Mandamus, in this class of cases, is in the nature of a suit to obtain a specific performance of a contract. But in the present case the performance sought is the payment of money, and the remedy substituted is equivalent to a suit at law for its recovery, with ample provision for the satisfaction of any judgment that may be obtained."

Opinion of the court in Antoni *vs.* Greenhow. The remedy provided by the act of January 26 is the substantial equivalent of that provided by the act of January 14, so far as the final relief obtained by each is concerned. The difference is only in the form of the proceedings.

In each, after tender of coupons, the taxes must be paid in money, and then suit is brought to recover the money unlawfully exacted; *i. e.*, the face value of the coupons tendered. In the case of Tennessee *vs.* Sneed the form of remedy provided by the act of January 26th was held to be a valid substitute for the action of *mandamus* for the same reasons for which the form of remedy provided by the act of January 14th was so held, in the case of Antoni *vs.* Greenhow.

The act of January 26 provides, that "there shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the taxpayer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition or any other writ or process whatever; but in all cases (where?) for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner." Now, when we consider that the "remedy above provided" is the substantial equivalent of the remedy provided by the act of January 14, it is difficult to see how the provision just quoted can be construed so as not to abolish the prior remedy; unless the general words be construed as limited by the specifica-

tion of a particular class of remedies which follows. If the provision be so limited, then the act takes away only such remedies as hinder and delay the collection of revenue. This point has never been directly decided by the State Court of Appeals. It was first raised in the present case in the court below, and the opinion of Circuit Judge seems to have been that the later act repealed the earlier.

However, whether the later form of remedy be substituted for the earlier, or both be still subsisting side by side, the taxpayer has at best but a choice of forms. The later remedy gives no fuller relief than did the earlier. Therefore, in the State of Virginia to-day, the remedy of the tax-payer who has tendered coupons, to compel the acceptance of his tender, is one that this court has held to be a valid substitute for the action of *mandamus*, but which certainly accomplishes no more than a *mandamus*, and does not pretend to enforce the tax-payer's right to have his coupon received when tendered.

Clearly this remedy alone is not adequate to vindicate the rights of the tax-payer who has made a tender of coupons. His other remedies are, as a rule, available only after some action or threatened action by the collector, looking to the collection of the tax by sale of the tax-payers' property.

B.—Remedy of the tax-payer where steps are taken, or threatened, to collect the tax by levy and sale.

A valid tender of the amount assessed for taxes has all the effects of payment in protecting and preserving the rights and property of the tax-payer. The tender of coupons has the same efficacy as the tender of money. Therefore, when the collector proceeds after a tender of coupons to collect taxes by force, he is in the position of

one who attempts to collect taxes that have been paid. His authority is to collect only delinquent taxes. When he attempts to collect taxes that have been paid, he exceeds his authority and becomes a mere wrong-doer. Against such an one the property-owner is entitled to all the remedies that the law affords for the protection of property. Under the laws of Virginia these remedies are to be sought either in a court of law or in a court of equity, as the nature of the case may require.

It is only thus, by resting on his tender and protecting his property when levied on for the tax, that the coupon-holder can enforce his contract right to have his coupon received when offered,—it is only thus that he can maintain the legal-tender character of his coupon. The remedies given by law, for the protection of his property after he har tendered his coupon, are also his only remedies for the enforcement of his contract right to have his coupon received when offered. These were the existing remedies when the contract was made.

But it is contended that the acts of Virginia of January 14 and 26 to which we have referred, have abolished all remedies in cases affecting the collection of revenue, and especially in cases of the collection or attempted collection of taxes where coupons have been refused, except the remedies provided by those acts.

The obligation of a contract is measured by the remedies for its enforcement. A right that has no corresponding remedy for its enforcement is no right at all. If therefore, there be a contract right and a corresponding remedy to enforce it the utmost the State can do to affect that remedy, is to regulate the mode of procedure, or to substitute an equally available remedy in its stead.

We have, then, to enquire, first, Did these remedies for the protection of the property of the tax-payer against seizure and sale for taxes, after the tender of coupons

equal in face value to the taxes claimed, correspond to and enforce any contract right of the coupon-holder under the State's contract with him? and second, if so, do the two acts of Virginia referred to above provide any equally available substitute for such remedies?

In issuing these coupons, the State said to each coupon-holder: "If taxes are assessed against you equal to the assessed value of this coupon and you offer this coupon to my collector in payment of these taxes, then you shall stand in the position of a man who has paid his taxes, if the coupon is accepted; and if refused, you shall stand in the position of a man who has done all that can be required of him, toward paying his taxes." The remedies of the tax-payer are those of the coupon-holder, for tax-payer and coupon-holder are one person. The contract implied that the man who paid his taxes in coupons should have all the rights and remedies of the man who paid in money; and that the man who tendered coupons should have all the rights and remedies of the man who tendered money. These remedies were not to specifically enforce the contract, but to protect against loss by violation of it. None the less did their existence give value to the contract.

To connect a remedy with a contract right, so that taking away the remedy impairs the contract, it is not necessary that the remedy be made part of the contract, or that the contract should look to that particular remedy for its enforcement. It is sufficient that a right is created by the contract, and that the right so created can be enforced by an existing remedy. The coupons in the present case contain two distinct contracts, viz: (1) the contract to pay when due and (2) the contract that they shall be receivable at and after maturity for all taxes, &c. The contract that they shall be receivable implies, (1) that they shall be received, and (2) that the offer of them for

taxes shall be as effectual as the offer of any other medium of payment. The effect of the offer of payment in money is to destroy the lien of the levy and to render illegal and void all subsequent proceedings to collect the tax by levy and sale. That effect is enforced by the remedies at law and in equity against the collector for the protection of the tax-payer's property. Therefore where the tax-payer tenders coupons, his right to have that tender an effectual one in law is enforced by these remedies.

A remedy may be one for the enforcement of a contract although it be not for the specific performance of the contract. An injunction restraining an act that would be in violation of a contract, enforces the contract. An action in damages for a breach of contract, or for an act done in violation of it, enforces the contract. The fact that the remedy lies against the collector and not against the State, makes it none the less a remedy to enforce the State's contract. The act of the agent is wrongful because it is in violation of his principal's contract. A remedy that restrains or punishes the agent for that violation, enforces the contract of his principal.

The proposition which we maintain, follows immediately from the nature of the coupon-holder's contract right.

A contract right is a right *in personam*. "The essentials of a right in personam are these: It resides in a determinate person or persons and avails against a person or persons certain or determinate. Further the obligation with which it correlates is negative or positive; that is to say, an obligation to forbear or abstain or an obligation to do or perform."—Austin, Lecture 16.

"The difference between sanction and obligation is simply this: Sanction is evil, incurred or to be incurred by disobedience to command; obligation is liability to that evil in the event of disobedience."

"If the party has acted or forborne agreeably to the

command he has fulfilled the obligation wholly or in part, and here there is a certain difference between positive and negative duties The performance of a positive duty extinguishes both the duty and the corresponding right; a negative duty is never extinguished by fulfillment, though if the right be extinguished by another cause the duty ceases."—*Id.*, Lecture 22.

The rights residing in the coupon-holder are (1) the right to have his coupon received for taxes and (2) the right to have the payment of his taxes in coupons an effectual payment. Those rights are necessarily created by the words "receivable for taxes." The words can have no other meaning.

Those rights avail against the State and the State's collectors, and impose on the latter these correlative obligations: (1) the positive obligation to receive and (2) the negative obligation to forbear or abstain from proceeding as if the tender or receipt of coupons were ineffectual, and the taxes were delinquent. The duty to receive would be extinguished by receipt; the duty to abstain from proceeding against the property of the coupon-holder would still exist. The sanction by which the positive obligation to receive is enforced, will be found in *mandamus* or action in the nature of *mandamus*. The sanction by which the negative obligation to abstain from proceeding as if no valid tender or payment had been made is enforced, will be found in the restraining or punitive actions in equity or at law, against the collector who proceeds to collect taxes after tender or payment of coupons. By the act of January 26th, that sanction is taken away, the obligation released and the right destroyed. Clearly the remedies that supply the sanction which enforces the negative obligation of the collectors and thereby confers on the coupon-holder the right to have his tender or payment in coupons effectual to dis-

charge his taxes, must be remedies whose taking away will impair the obligation of the contract.

Again, a recognized test to determine whether a remedy is so connected with a contract that to take away the remedy impairs the contract, is to see how the taking away of the remedy affects the value of the contract. At the date of the contract, to have taken from the coupon-holder all remedies to protect his property after a tender of coupons, would have left him with the single remedy by *mandamus*. After refusal of his tender he might proceed by *mandamus* to compel the collector to accept the tender and discharge the tax. In the meantime, the collector might proceed to sell the coupon-holder's property for taxes, just as if no tender of coupons had been made.

This court has held, that by reason of the inadequacy of this remedy by *mandamus* the coupon-holder lost nothing by having substituted for it a remedy that secured nothing more than the payment of the coupon after final judgment.

Take to-day from the coupon-holder his remedies at law and in equity against the collector who proceeds to collect taxes, after tender of coupons, and his only remedy is one or the other of the substitutes for *mandamus* provided by the acts of January 14th and January 26th respectively. He has no remedy to enforce his right to have his coupon received when offered; he has none to secure to him the legal effect of his tender. His coupon is no longer receivable at and after maturity for taxes due the State.

Our first question must be answered in the affirmative. The remedies for the protection of the property of the tax-payer against seizure and sale for taxes, after the tender of coupons equal in face value to the taxes claimed, did answer to and enforce contract rights of the coupon-holder under the State's contract with him.

By the acts of January 14th and 26th, the State says to the coupon-holder: "If you tender coupons in payment of taxes assessed against you, those taxes will be treated as delinquent, and you shall have no remedy to protect yourself from loss by levy and sale of your property in violation of any contract with you. Your only course shall be to acknowledge your taxes delinquent, pay them in money, and then sue me or my collector for the money illegally exacted from you." It is submitted that the State's action deprives the coupon-holder of valuable contract rights by taking away the remedies for their enforcement. We have shown that the remedies of the taxpayer after payment were the remedies of the coupon-holder after tender. These remedies the act of January 26th in terms takes away. The only question, then, is this: Does that act provide an equally available remedy in their stead?

The remedial provision of the act is, "that the several tax collectors of this commonwealth shall receive in discharge of the taxes, license taxes and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else; provided that in all cases in which an officer charged by law with the collection of revenue due the State, shall take any steps for the collection of the same claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the State treasury, giving notice at the time of such payment to the treasurer that the same was paid under protest. The person paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue

in any court having jurisdiction of the parties and amounts. If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon, the auditor of public accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasurer, except such as have priority by constitutional requirement." Then follow the clauses abolishing all other remedies. This is made the only remedy in all cases of the collection of revenue, or the attempt to collect revenue illegally, *or the attempt to collect revenue in funds only receivable by said officers under this law.*

Now in a case where the illegality of the attempt to collect taxes arises from the fact that those taxes have already been paid, the remedy given by this act is clearly impotent to protect the tax-payer. The bare claim by the collector that taxes are due and must be paid, puts the tax-payer to the necessity of paying the amount claimed. But when the tax-payer has paid the second time he is no better off. The collector may claim again, and again the tax-payer must pay. Clearly, without some other remedy, all that the tax-payer owns may be forced from him, and he be left with mere rights of action in lieu of his property. The State has no power to put its collectors above the law. It cannot authorize the taking of property for a tax that has been paid. The law must intervene at some point, to protect the man who has paid his taxes, and it will intervene after the first payment.

Therefore, this act would be interpreted as not intended to apply to a case where the illegality of the attempt to collect revenue arises from payment, were it not for the clause that we have emphasized by italics. That clause

makes the remedy of the act the only remedy in the case where the illegality of the attempt to collect taxes arises from the fact that they have been discharged by a tender of coupons. It is that clause of the act that makes unconstitutional the abolition of all other remedies. Without that clause, the act would be interpreted to mean that in cases where the tax was *uncollected*, and the tax-payer claimed an exemption, or that the assessment was excessive, or the levy irregular, and the like, in those cases the only remedy should be that provided by the act. As it is, the act must be interpreted as not intended to apply to any case where the illegality of the attempt to collect taxes arises from the fact that they have been discharged, except the case where that illegality arises from the discharge of the taxes by tender of coupons. Otherwise the coupon-holder, who has tendered both coupons and money is no better off than he who has tendered only coupons, and the act is beyond the States' power, because in conflict with the citizens rights of property under the Federal Constitution.

The act itself recognizes that there were in existence at the date of its adoption, remedies for the protection of the property of the tax-payer who had paid his taxes, which would be the remedies of the coupon-holder if not specifically taken away by the act. The remedies of the tax-payer who has paid in money, are kept alive, while those of the tax-payer who has paid in coupons, are annihilated.

But the State's contract with the coupon-holder was that the tender of his coupon for taxes should have all the effects of a tender of money. The contract was that the man who had discharged his taxes by a tender of coupons should have all the rights and remedies of the man who had discharged his taxes by tender of money. Those remedies were the measure of the coupon-holder's

rights. If the remedy provided by the act of January 26 is not adequate to protect the rights of the taxpayer who has discharged his taxes, then that remedy is not adequate to protect the rights of the coupon-holder under his contract. Our second question must be answered in the negative. The act of January 26 does not give the coupon-holder a remedy equally available for the enforcement of his contract rights with those that it seeks to take away.

Therefore, that act is void as against the coupon-holder. It is not necessary to examine the remedy given by the act of January 14, even if it be still in existence; for we have shown that it is in all matters of substance the same remedy as that given by the act of January 26.

It is submitted that the remedies of the coupon-holder are the remedies of the tax-payer who has discharged his taxes, and that, except *mandamus*, those remedies at law and in equity exist to-day as if the acts of January 14th and 26th had never been passed.

3.—The Remedy in the present case was properly sought in Equity.

The wrongs for which the complainant and appellee sought relief were:

1st. The refusal of the Treasurer and Auditor to accept the payment tendered, to enter the taxes paid and give a receipt, so as to release the lien upon the complainant's real estate which constituted a cloud on its title.

2d. The action of the auditor in increasing the assessment of complainant's lines from $15,000 to $20,000 per mile, by way of penalty for non-payment, thereby creating an additional lien on the complainant's real estate, and imposing a penalty where there had been no default.

3d. The seizure and threatened sale of sixty-one cars

and one locomotive belonging to the complainant and the threatened seizure of more of its rolling stock; whereby the complainant was incapacitated for operating its lines, and was threatened with irreparable loss.

The relief which the complainant sought was:

1st. That it be adjudged and decreed that by the tender of coupons and coin and the bringing the same into court, the original taxes were discharged and the lien thereof released;

2d. That the so-called assessment made by the auditor of public accounts by way of penalty, and the attempted levy of a tax thereunder be adjudged illegal and void, and that complainant be thus relieved from the penalty, and the apparent cloud on its title be removed;

3d. That the defendant John Ed. Hamilton be restrained from selling the property of complainant that he has seized, and from seizing and selling other property; and that all the defendants be restrained from attempting further to collect the taxes for which the tender had been made, or the taxes attempted to be levied under the increased assessment.

This case, then, presents several long-recognized grounds for equitable relief. We shall briefly recite in order the grounds that are made by the pleadings and proofs.

A.—The lien of the taxes levied creates an apparent cloud on complainant's title.

The bill of complaint alleges that the records of the Auditor of Public Accounts show that the taxes levied against the complainant's leased railroads have not been paid, and that therefore those taxes are still a lien on its real estate.—Record, page 10. This allegation is not denied. The Code of Virginia of 1873, Title 12, Chapter 33, Section 13, provides that "all real estate, except such

as may be exempted by the next succeeding section, shall be subject to such annual taxation as may be prescribed by law, and a lien shall exist on such real estate for the payment of the taxes imposed thereon."

There is therefore an apparent cloud on complainant's title, the invalidity of which does not appear on the record, but depends on an extraneous fact, to wit: payment. —Cooley on Taxation, Chapter 24, page 542. In such a case equity will remove the cloud.—Dows *vs.* Chicago, 11 Wall. 108.

B.—The complainant seeks to be relieved from a penalty illegally imposed.

Having tendered the full amount of the taxes assessed, the complainant was not in default, and was entitled to relief in equity against the penalty imposed.—Litchfield *vs.* County of Webster, 101 U. S. 779. The answer of the defendants (page 23 of Record) states expressly that the increased assessment was imposed by way of penalty for the purpose of compelling payment in money.

C.—The action of the defendants prevents the complainant from discharging its duties as a public carrier.

The fact that the seizure of the complainant's rolling stock is a serious interference with its business as a public carrier is alleged in the bill and not denied by the answer.

Item Fourth of the Agreement of Counsel, printed in the Record at page 43, admits further that the withdrawal from complainant's use of the rolling stock and machinery levied on will cause serious and prolonged embarrassment to complainant's business. To prevent great public inconvenience there must be a preventive remedy. A preventive remedy can be found only in equity.

D.—The acts against which relief is sought, threaten irreparable injury.

That the injury to the complainant from the threatened sale of its property will be irreparable is alleged in the bill and admitted in the agreement of counsel.

Item Fourth of that agreement, printed at page 43 of the Record, is as follows: "Fourth.—That should the property of complainant levied on by said John Ed. Hamilton, be sold, as advertised in the Valley Virginian, great sacrifice and loss must result therefrom; and that the withdrawal from complainant's use of the amount of rolling stock and machinery levied on and proposed to be sold as aforesaid will cause serious and prolonged embarrasssment to complainant's business; that much delay must accrue before such rolling stock and machinery, if sold, can be replaced, and that it will be difficult, if not impracticable, to ascertain and estimate, with even proximate certainty, the losses and damages which would result to complainant from such sale; so that although the estate of said J. Ed. Hamilton should be sufficient to meet any verdict for damages in case the sale should be adjudged to have been illegal, the pecuniary value of the complainant's losses and damages could not be properly and adequately ascertained and fixed by the verdict of a jury. But that said company has much other rolling-stock not embraced in the levy employed on this and its other lines."

It is, then, a *concessum* in this case that the complainant has no adequate remedy at law by suit for damages against the defendant, John Ed. Hamilton. The only question left open is whether either of the remedies provided by the acts of January 14th and 26th respectively, affords complete and adequate relief so that equity will not interfere. Each of those remedies consists in paying the amount of taxes claimed and then suing to

recover the mo ey illegally exacted. Each has been pronounced a valid substitute for *mandamus*. But it has never been held that *mandamus* gave complete relief to a tax-payer whose goods were about to be sold for taxes. *Mandamus* could not stop a sale, and neither of these remedies will stop the sale of the complainant's property.

In Virginia, for many years, and long before the act of March 30th, 1871, was passed, injunction, has been and was, the recognized remedy in such cases.

"By a long course of decisions, it has been settled that the remedy against an attempt to coerce the payment of an illegal tax, is injunction."

See City of Richmond against Crenshaw, 76 Virginia, 936, citing Bull against Reed, 13 Grat. 78, decided in 1856; Eyre against Jacob, 14 Grat. 422, decided in 1857, and the following cases since decided:

Miller against Lynchburg, 20 Grat. 330;

Johnson against Drummond, 20 Grat. 419;

Llewellyn against Lockharts, 21 Grat. 570;

City of Richmond against the Richmond and Danville R. R. Co., 21 Grat. 604.

See also Shenandoah Valley Railroad Company against the Supervisors of Clarke County, 78 Virginia 269, in which the court say:

"The first question for consideration is that raised by the demurrer, the jurisdiction of a court of equity being denied upon the ground that the complainants' relief in a court of law is full and complete. Upon this question there can be but little doubt. Such jurisdiction in a court of equity has been frequently sustained by this court and cannot now be questioned, and the circuit court rightly so decided."

Citing among other cases before referred to, Goddin against Crump, 8 Leigh, 121, decided in 137.

There can, then, be no doubt that when the act of March

30, 1871 was passed, injunction existed as a remedy in such cases, and it became a remedy of the coupon-holder to enforce his contract. And it will be noted that the Virginia cases referred to, have reference to threatened distraints upon, and sales of, personal property.

We submit then, that if this remedy existed to arrest the attempt to sell the tax-payer's personal property on the ground of illegality in the assessment or in the tax itself, *a fortiori* did it exist to prevent the greater evil of a sale, under the pretence of a tax-claim which had in fact been paid, as authorized by the contract itself; the fact of such payment being plainly admitted. The complainant in this case, is a coupon-holder seeking to enforce its contract. Therefore the complainant is entitled to a remedy by injunction in equity; and cannot be compelled to resort to another remedy, which denies to it the efficacy of its coupons as a legal tender.

See L. and N. R. R. Co. 3d Fed. Reporter, 266.

E.—The relief sought is necessary to prevent a multiplicity of suits.

The admitted allegations of the bill of complaint show that the defendant, John Ed. Hamilton, has made three distinct levies in three different counties, taking in all a large number of cars. There must, therefore, be at least three sales, at each of which the buyers may be numerous. It is conceded that the possession and use of those cars are necessary to the complainant to prevent serious loss that cannot be estimated by a jury. Hence it appears that if the complainant would escape loss for which it has no remedy, it must reclaim its property from each purchaser. This would lead to a multiplicity of suits.

F.—A collector avowedly proceeding under an unconstitutional law, to collect a tax that has been paid, will be restrained by Equity from vexing and oppressing the citizen.

We have already shown, that the tender of a tax is equivalent to its payment, and that the party tendering payment is entitled to all the remedies of the party who has paid. We have also shown, that in this case, there are well-recognized grounds for the interference of a Court of Equity by injunction, even if the case were only the ordinary one of an attempt to enforce a tax whose illegality or invalidity was asserted by the tax-payer. We recognize the general rule of the United States Courts as laid down by this court, in Dows *vs.* Chicago, 11 Wall. 108, and in the State Railroad Tax cases, 92, U. S., 612-617, that mere invalidity of the tax or illegality in the mode of its assessment, is not sufficient to authorize a Court of Equity to enjoin its collection, unless the State courts would grant that relief in a like case. But the reasons for this rule of equity, are founded on grounds of public policy, that the State must not be hampered in the collection of the revenue needed for the support of government, by every claim of illegality in the imposition of taxes; and that it is better for the tax-payer to suffer the inconvenience of paying a tax alleged by him to be illegal, and of suing for the recovery of money paid, than for the State to delay its collection of the public revenue, until by the tedious forms of a judicial contest the legality of such collection can be determined. The other ground upon which equity has refused to interfere by injunction, is that a "Court of Equity has no power to apportion the tax, to make a new assessment, or to direct another to be made by the proper officers of the State."—92 U. S., p. 614.

We submit that none of the reasons for the non-interference of a court of equity apply to a case where the taxes have been paid, and the fact of payment is admitted. The tax-collector, we will suppose, admits the tender in money of the amount due for taxes, but nevertheless informs the tax-payer that he will not accept the money offered, but will seize the property of the tax-payer, and sell it to obtain the very sum which he has refused to accept from the citizen whom he thus proposes to vex and oppress. The collector does this, not simply in a single instance, but as an avowed rule of conduct, enforced by a command from the State that he shall thus harass the tax-payer. Can there be a doubt that equity would require such a collector to stay his hand? Suppose a bill filed by the tax-payer, alleging tender of the amount due, and bringing the sum tendered into court, and an answer by the defendant collector, admitting the tender but asserting that notwithstanding such tender he would proceed to seize and sell the property of the complaining tax-payer, for the very purpose of compelling the payment of the exact sum which he had refused. Is there any question that a court of equity would enjoin such a collector from further proceeding to thus harass the citizen? Could any sound reason be urged why such an injunction should not issue? It does not delay revenue collection; it hastens it. The collector has delayed such collection. An injunction forbidding him from seizing the tax-payer's property, may be regarded as at least a persuasive reason for taking the taxes when payment is offered him. Would not such a cause present the case of a public officer attempting to do as a regular course of conduct, that which by virtue of his office, he has no right to do? It is not the commission of a single trespass, but it is a claim to act upon a regular principle which will lead in the end to repeated trespasses. It is

not the claim of a public officer to do one act that is illegal, but of a number of such officers to do a number of such illegal acts. Certainly in such a case, as no ground of public policy intervenes to prevent the interposition of equity, it should stop such an illegal course of conduct which will lead to constant litigation and repeated injuries.

In the case of Cummings *vs.* The National Bank, 101 U. S. 153, this court said:

"Independently of this Statute however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment which is designed to operate unequally, and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

In this case the court interfered to restrain the sale of personal property and the collection of a tax which was claimed to be illegal by reason of the wrong principle adopted in the mode of assessment applicable to a number of cases; and the court recognized such a case as a proper one for the interference of a court of equity.

The case of the coupon-holder tendering his coupons for taxes, if our argument as to their legal-tender quality be sound, presents even a stronger case for equitable relief by injunction, than that of the tax-payer who has tendered his taxes in money.

In the case of the tender of coupons, the State has by solemn contract agreed that they shall be received for the taxes, and as a necessary implication in that contract, that when tendered the property of the tax-payer shall be free from any of the consequences of delinquency in the payment of taxes, that is, free from seizure or sale.

This is the State's agreement and obligation, which by the Federal Constitution she is forbidden to impair by any subsequent act of legislation. Under a subsequent act, the State has commanded her collectors to violate her agreement and instructed them not to receive the coupons, and has affirmed that though they be tendered in payment of taxes, that tender shall still leave the property of the tax-payer subject to all the consequences of delinquency, that is, to seizure and sale.

Here therefore, is a case where a rule has been adopted by the State collectors under a State statute, which rule is a violation of the fundamental principles of the Federal Constitution, and where proceeding to act upon that rule, the State collector not only commits a tort, in fact a series of torts, but he also violates a contract which is protected by the Constitution of the United States.

In view of the general principles recognized by this court as before stated, we submit that the relief in this case was properly sought in equity. But when the uniform usage and practice before referred to of the courts of Virginia on the subject of injunction in such cases is considered, there would seem to be no doubt remaining that injunction was the proper remedy for the complainant.

It is true that what is said by the Court in Cummings *vs.* National Bank, 101 U. S., 157, as to following State precedents concerning injunctions, has respect to statutes giving new remedies. And to the same effect may be the words of the Chief Justice in the case of Litchfield *vs.* County of Webster, Id. 781, as follows:

"It may fairly be inferred from what is said in Litchfield *vs.* County of Hamilton, 40th Iowa, 66, that in such a case the courts of the State would afford a remedy."

This may be; but where, as in this case, the remedy by injunction, as recognized by the State courts, existed at

the time the coupons were issued, and so constituted a part of the contract contained therein, and it is found that at that time the State courts recognized injunctions as the proper remedy in such a case as that now presented, the Federal court will grant that relief, not only in deference to State usage, but in view of the further fact that such remedy having entered into the contract itself no equivalent has been supplied.

G.—The remedies provided by the act of January 14 *and* 26 *respectively, were not available to this complainant.*

Under the act of January 26 no step can be taken by the tax-payer until some step has been taken for the collection of the tax. In the case of railroad companies the first step after default in payment is to increase the assessment to $20,000 per mile by way of penalty. Therefore the only mode in which this act could be resorted to by the complainant, would be by its submitting to the penalty and tendering 33 1-3 per cent. more than the tax originally assessed. It follows that the remedy provided by the act of January 26 was not available to the complainant as a tax-payer; and yet to this hospitable enactment are we invited for relief adequate to and commensurate with that aforetime. How is it as to the act of January 14, 1883? Under the assessment act of April 22, 1882, it was the complainant's duty to pay the amount assessed against it into the treasury of the State. This it undertook to do, but the tender of the amount in coupons was refused absolutely and without respect to the provisions of the act of January 14. None of those to whom the complainant tendered its coupons, viz: the Auditor, Treasurer and State depositary, deemed himself authorized to act as the State's collector to receive the coupons for verification and give areceipt therefor, as provided by the act of January 14. The only course open

to the complainant was to make tender as best it could, and then go into equity to give the tender full effect.

It is submitted that equity will take jurisdiction in the premises.

4.—The Decision in Antoni *vs.* Greenhow.—The present case is not res adjudicata.

The Chief Justice in the conclusion of his opinion uses this language: "We repeat that the question presented by this record is *not* whether the tax collector is bound in law to receive the coupon, notwithstanding the legislation which on its face prohibits him from doing so, nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but, whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons. We decide only the question which is actually before us."

The court had already said that "the right of the coupon-holder is to have his coupon received for taxes when offered." Scrutinize the opinion as we may, and it will be found to be, in substance, a mere comparison of two modes in which the coupon-holder might himself compel the tax collector to receive the coupons and accept them as payment in discharge of taxes due.

Those two modes were: (1) *Mandamus*, as it was aforetime; and (2) the processes under the act of January 14th; and all the reasoning and words of the court must be limited to the relative merits of those two remedies, one of which the coupon-holder should have the right actively to use. If the provisions of the new act, as an active remedy to be resorted to by the tax-paying coupon-holder, should be substantially as efficient as those of *manda-*

mus would have been, then the new act must stand; otherwise *mandamus*, as part of the contract when made, must remain—that was the question. The court, as to that, thought that the provisions of the act *were* substantially as efficient for the prompt enforcement of the right, when and if resorted to by the coupon-holder himself, as those of *mandamus* once were, in like cases—so the change in the remedy did not impair the obligation of the contract.

But, the court did not intend to express any opinion as to the effect of the tender *per se;* as to the effect of this fact, preceding any active efforts of the tax-payer to compel the collector to receive the coupons, and to receipt the tax bills. As to that, all the court said was, that "the *right* of the coupon-holder is to have his coupon received for taxes *when offered.*" It forebore to say what redress the tax-payer who had made the tender, would have, if the collector *per fas aut nefas* should attempt to violate his right by forcing his property to sale; or what restraining power the tax payer might invoke to stay the hand of the oppressor. It certainly failed to consider or to intimate an opinion as to such a case as that now under consideration; a case *sui generis*, of a peculiar character; where the tax-payer being assessed with a sum to be paid into the State Treasury, has duly, lawfully and in good faith made tender of the full amount to the officials of the State in confessedly genuine tax receivable coupons; where, the tender being peremptorily refused, the tax assessment was increased 33⅓ per cent., by way of penalty for the offence of tendering in payment what the State had agreed and bound itself, by an irrevocable contract, to receive for the taxes assessed, and also for its failure to pay the amount *in money* and so to leave its coupons unpaid and repudiated in its hands; where, for the amount so increased, the collector, without law

for so doing, has seized the motive power of a great public corporation—has threatened to break up its business as a common carrier, and to inflict on it injuries confessedly incapable of being adequately compensated in damages by a jury. This is the case of the appellee here; and, nothing decided in Antoni *vs.* Greenhow can fairly be understood to bear against it.

And this court is now to decide, whether there was any, and if any, what virtue in the *bona fide* tender, complete in all respects, admitted to have been made. The appellee rested upon that tender, and upon the virtue inherent in it, to protect it from harm. And when assailed, with the view to the enforcement of a wrongful and oppressive assessment, made by an officer of the State, it had clearly, under Virginia law, and also we think, under principles recognized by this court, the right to invoke the restraining power of equity. It did not resort to the acts of January 14th and 26th; indeed it could not have done so, as neither of them was intended to apply to its case.

But apart from this, it had no occasion to resort to the act of January 14th, for the reason that, recognizing on its face the receivability of coupons, if genuine, the object of that act was to ascertain and settle *one* fact *only*, that is, the *genuineness* of the tax-receivable coupons tendered;—and that fact being conceded here, in as solemn and binding form as if a jury had ascertained it by a verdict, there was no occasion for enacting the farce of paying into and getting out of the treasury in money the amounts of coupons about which no dispute existed. In any event, equity which regards the substance and disregards the form, must so hold.

Again; as to the matter of remedy, the court did not decide that *mandamus* was aforetime the *only* remedy of the tax-payer when tender in coupons was refused. If so, then of course, it did not intend (as it clearly states it

did not) to decide that the act of January 14th, which is only a substitute for *mandamus*, is the *only* remedy now left to the tax-payer. We think we have shown that, at the date of the contract here involved, when *mandamus* was in full force, injunction was also a sure and efficient remedy of the tax-payer and coupon-holder. If so—no substitute for it having been provided—the act attempting to abrogate it is a nullity; and equity still affords the same sure protection against such wrongs as are alleged in the bill and established by the evidence in this cause.

HUGH W. SHEFFEY,
JOHN K. COWEN,
HUGH L. BOND, JR.,
Of Counsel.

APPENDIX

ACTS OF VIRGINIA.

CHAP. 7. An ACT to prevent frauds upon the commonwealth and the holders of her securities, in the collection and disbursement of revenues.

Approved January 14, 1882.

Whereas bonds purporting to be the bonds of this commonwealth issued by authority of the act of March thirtieth, eighteen hundred and seventy-one, entitled an act to provide for the funding and payment of the public debt, and under the act of March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law; and whereas other such bonds are in existence which are spurious, stolen, or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the commonwealth; and whereas the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts, and demands; and whereas genuine coupons from genuine bonds, after having been received in payment of taxes, debts, and demands, are fraudulently reissued and received more than once in such payments; and whereas such frauds on the rights of the holders of the aforesaid bonds impairs the contract made by the commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts, and demands due the said commonwealth, and at the same

time defrauds her out of her revenues; therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the commonwealth, and of preventing frauds in the revenue of the same,

1. Be it enacted by the general assembly Virginia, That whenever any tax-payer, or his agent, shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the commonwealth, any papers or instruments in print, writing, or engraving, purporting to be coupons detached from bonds of the commonwealth issued under the act of eighteen hundred and seventy-one, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered, shall receive the same, giving the party tendering, a receipt, stating that he has received the same for the purpose of identification and verification.

2. He shall at the same time require such tax-payer to pay his taxes in coin, legal tender notes, or national bank bills, and upon payment, give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

3. He shall mark each paper as coupons so received, with the initials of the tax-payer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county, or hustings court of the city, in which such taxes, debts, or demands are payable. The tax-payer shall thereupon be at liberty to file his petition in said county court against the commonwealth. A summons to answer which petition shall be served on the commonwealth's attorney, who shall appeal to and defend the same. The petition shall allege that he has tendered certain coupons in payment of his taxes, debts, and demands, and pray

that a jury be impanneled to try the question as to whether they are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. Upon this petition an issue shall be made in behalf of the commonwealth, which shall be tried by a jury, and either party shall have a right to exceptions on the trial, and of appeal to the circuit court and court of appeals. If it be finally decided in favor of the petitioner, that the coupons tendered by him are genuine, legal coupons, receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon receipt thereof, shall receive said coupons for taxes, and shall refund the money before then paid for his taxes by the tax-payer, out of the first money in the treasury, in preference to all other claims.

4. Whenever any tax-payer shall apply to any court in this commonwealth for a mandamus to compel any person authorized to receive or collect taxes, debts, or demands due the commonwealth, to receive coupons for taxes, it shall be the duty of such person to make return to said mandamus, that he is ready to receive said coupons in payment of such taxes, debts, and demands, as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return, the court before whom the application is made, shall require the petitioner to pay his taxes to the tax-collector of his county or city, or to the treasurer of the commonwealth; and upon filing the receipt for such taxes in such court, the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the county court of the county, or hustings court of the city, where such taxes are payable, and direct said court to frame an issue between the petitioner, as plaintiff, and the commonwealth, as defendant, as to whether the coupons so tendered are

genuine coupons, legally receivable for taxes. On the trial of the cause, the attorney for the commonwealth in the lower courts, and the attorney-general in the supreme court of appeals, shall appear for the commonwealth, and require proof of the genuineness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the circuit court and supreme court of appeals on the trial of this issue. If the decision be finally in favor of the petitioner, the mandamus shall issue requiring the coupons to be received for said taxes, and so forth, and they shall be so received; and on the certificate of such judgment, the treasurer of the commonwealth shall forthwith refund to the tax-payer the amount of currency or money before then paid by him for taxes, out of the first money in the treasury, in preference to all other claims.

5. This act shall be in force from its passage.

CHAP. 41.—AN ACT to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt.

Approved January 26, 1882.

1. Be it enacted by the general assembly of Virginia, That the several tax collectors of this commonwealth shall receive in discharge of the taxes, license taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else; provided that in all cases in which an officer charged by law with the collection of revenue due the state, shall take any steps for the collection of the same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such pay-

ment the officer collecting the same shall pay such revenue into the state treasury, giving notice at the time of such payment to the treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue, in the court having jurisdiction of the parties and amounts. If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and, thereupon, the auditor of public accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement. There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the taxpayer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition, or any other writ or process whatever; but in all cases for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner. In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the state, as in criminal cases. The commonwealth's attorney for the county or corporation in which suit is brought, shall appear and

represent the defence. In every case where judgment is rendered for the defendant, a fee of five dollars shall be taxed in favor of said attorney and against the plaintiff; and whenever the court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of five dollars shall be taxed against the said officer. Any officer charged with the collection of revenue, who shall receive payment thereof in anything other than that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the state to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the state any kind or description of funds, security, or paper not authorized by this act.

2. This act shall be in force from and after the first day of December, eighteen hundred and eighty-two.

114-317

MAR 25 1885
JAMES H. MCKENNEY
CLERK

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1884.

No. 826.

S. BROWN ALLEN, *Auditor of the Public Accounts of the State of Virginia, et. al.*, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

SUPPLEMENTAL BRIEF FOR APPELLEE.

HUGH W. SHEFFEY,
JOHN K. COWAN,
HUGH L. BOND, JR.,
Of Counsel.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1884.

No. 826.

S. Brown Allen, *Auditor of the Public Accounts of the State of Virginia, et. al.*, Appellants,

vs.

The Baltimore and Ohio Railroad Company, *Appellee.*

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLEE.

Rights and Remedies of the Coupon-holder.

A.—*Analysis of the terms Right, Obligation and Remedy.*

We shall quote from John Austin's Lectures on Jurisprudence, 4th London Ed., 1873.

"Every right is a right *in rem* or a right *in personam*.

"The essentials of a right *in rem* are these: It resides in a determinate person, or in determinate persons, and avails against *other* persons *universally* or *generally*. Further, the duty with which it correlates, or to which it corresponds, is *negative*; that is to say, a duty to forbear or abstain. Consequently, all rights *in rem* reside in determinate persons, and are rights to forbearances on the fact of persons generally.

"The essentials of a right *in personam* are these: It resides in a determinate person, or in determinate persons, and avails against **a** person or persons certain and determinate. Further the obligation to which it corresponds, is negative *or* positive; that is to say, an obligation to forbear or abstain, or an obligation to do or perform. Consequently, all rights *in personam* reside in determinate persons, and are rights to *forbearances* or *acts* on the part of determinate persons. It follows from this analysis, First, That all rights reside in determinate persons. Secondly, That all rights correspond to duties or obligations incumbent upon *other* persons; that is to say, upon persons distinct from those in whom the rights reside. Thirdly, That all rights are rights to *forbearances* or *acts* on the part of the persons who are bound.

These (I believe) are the only properties wherein *all* rights resemble or agree.

Consequently, right considered in abstract (or apart from the *kinds* and *sorts* into which rights are divisible) may be conceived and described generally in the following manner:

Every legal duty arises from a *command*, signified expressly or tacitly by the sovereign of a given society.

Every legal duty binds the party obliged by virtue of a legal sanction. In other words, in case the party obliged violate the duty imposed upon him he will be obnoxious or liable to evil or inconveniences to be inflicted by sovereign authority.

Now the person who is subject to a duty, or upon whom a duty is incumbent, is bound to do or to forbear from some given act or acts. And further, he is bound to do or to forbear from the given act or acts absolutely or relatively; that is to say, *without respect* to a determinate person or persons, or *towards* a determinate person or determinate persons.

The *objects* of duties are acts and forbearances, or (changing the expression) every party upon whom a duty is incumbent, is bound to do or to forbear. Or (changing the expression again) the party violates the duty which is incumbent upon him by *not* doing some act which he is commanded to do, or by doing some acts from which he is commanded to abstain.

Duty is the basis of Right; that is to say, parties who *have* rights or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon *other* parties. Or (in other words) parties invested with rights *are* invested with rights because other parties are bound by the command of the sovereign to do or perform acts, or to forbear or abstain from acts. In short the term 'right' and the term '*relative duty*' signify the same notion considered from different aspects. Every right supposes distinct parties: A party commanded by the sovereign to do or to forbear, and a party *towards* whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command is said to lie under a *duty:* that is to say, a *relative* duty. The party *towards* whom he is commanded to do or to forbear, is said to have a *right* to the acts or forbearances in question. Or the meaning which I am laboring to convey may be put thus:

Whenever a right is conferred a relative duty is also imposed; the right being conferred upon a certain or determinate party other than the party obliged. Or (changing the expression) a party is commanded to do or forbear from those given acts *towards*, or *with regard to*, a party *determinate* and *distinct from himself*."—Lecture 16, pp. 405, 406 and 407.

"Right;—the capacity or power of exacting from another or others acts or forbearances;—is nearest to a true definition."—*Id.* p. 410.

"A party lying under a duty, or upon whom a duty is incumbent, is liable to evil or inconvenience (to be inflicted by sovereign authority) in case he disobey the command by which the duty is imposed. This conditional evil is the *sanction* which enforces the duty, or the duty is *sanctioned* by this conditional evil: And the party bound or obliged, is bound or obliged, *because* he is obnoxious to this evil, in case he disobey the command. That bond, *vinculum* or *ligamen*, which is of the essence of *duty*, is simply or merely liability or *obnoxiousness* to a *sanction*."—*Id.* p. 422.

"The difference between sanction and obligation is simply this:

Sanction is evil incurred, or to be incurred by disobedience to command. Obligation is liability to that evil in the event of disobedience,

Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms. If the party has acted or forborne agreeably to the command, he has fulfilled the obligation wholly or in part, and the obligation has wholly or in part ended or ceased in respect of that act or forbearance.

And here there is a certain difference between positive and negative duties. The end or scope of positive duties, and of the *jura in personam* which correspond to them is the performance of that to which the party obliged by the duty is bound. But the scope or purpose of negative duties, and of the rights with which they correlate, is not the observance of the office or obligation; although that observance is a necessary condition to the enjoyment or exercise of the right. A positive obligation, therefore, is determined by fulfilment, but an office or negative obligation, is not determined by fulfilment, but by an event extraneous to the duty, namely, the extinguishment of the right with which it correlates, or of a right which it regards or concerns.

The performance of a positive duty extinguishes both the duty and the corresponding right. A negative duty is never extinguished by fulfilment, though if the right be extinguished by another cause, the duty ceases. This difference between positive and negative duties, has been erroneously supposed to be a difference between offices and obligations; a confusion of ideas pregnant with important misconceptions, and which obscures the difference between offices and obligations, between *jura in rem* and *jura in personam*. If on the other hand, the party has disobeyed the command by action, forbearance or omission, he has actually incurred the sanction, or is actually liable to the application of the sanction, and, in respect of the forbearance which he has *not* observed, or in respect of the act which he has forborne or omitted, the duty or obligation to which the sanction was annexed, has (as before), wholly or in part, ended or ceased. The sanction which has attached upon him may consist of a new obligation, but that obligation to which the sanction was appended, has (wholly or in part) determined.

It is not unfrequently said 'that sanctions operate upon the will,' and 'that men are obliged to do or forbear through their *wills*.'

It were more correct to say 'that sanctions operate upon the desires,' and 'that men are obliged to do or forbear through their desires.' Stated plainly and precisely, the fact is this: The party obliged is averse from the conditional evil, which he may chance to incur in case he break the obligation: In other words, he wishes or desires to avoid it. But in order that he may avoid the evil, or may avoid the chance of incurring it, he must fulfil the obligation; he must do *that* which the law enjoins, or must forbear from *that* which the law prohibits. That every sanction operates upon the *desires* of the obliged, is true. For he is necessarily averse from the

evil with which he is threatened by the law, *as* he is necessarily averse from every evil whatsoever."—*Id. Lecture* 22, pp. 458 and 459.

"Having endeavored to explain the essentials of injuries and sanctions, and therein, to illustrate the nature of obligations or duties, I will now advert to the differences by which sanctions are distinguished. If I attempted a complete examination of all these differences, the present inquiry would run to inordinate length: and those more important differences upon which I shall touch, will sufficiently suggest the others to the memory and reason of my hearers.

And first; Sanctions may be divided into *civil* and *criminal*, or (changing the expressions) into *private* and *public*.

As I remarked in a former lecture, the distinction between private and public wrongs, or civil injuries and crimes, does not rest upon any difference between the respective tendencies of the two classes of offences: *All* wrongs being in their *remote* consequences *generally* mischievous; and most of the wrongs styled public, being *immediately* detrimental to determinate persons. Viewed from a certain aspect, all wrongs and all sanctions are public, for all wrongs are violations of laws established directly or indirectly by the Sovereign or State. And all sanctions are enforced by the Sovereign or by Sovereign authority.

But in certain cases of wrongs which are offences against rights, or (changing the expression) which are breaches of relative duties, the sanction is enforced at the instance or discretion of the injured party. It is competent to the determinate person immediately affected by the wrong, to enforce or remit the liability incurred by the wrong-doer. And in every case of the kind, the injury and the sanction may be styled *civil*, or (if we like the term better) *private*."—*Id.* Lecture 27, p. 517.

A right, then, can be defined only in terms of its correlative obligation. That obligation exists only by reason of the existence of a sanction. In the case of a contract right that sanction is effectual only when there is a legal remedy to enforce it; for only through a legal remedy can he in whom resides the right to the fulfilment of the obligation, invoke the sovereign authority to enforce the sanction. Hence it is that there can be no *legal right* without a *legal remedy*.

Take a simple contract for the payment of money between man and man. The instant the formalities required by law are gone through, the payor is commanded by the sovereign authority to fulfil the terms of his contract. That command creates an obligation because there is a sanction to the application of which the payor will become liable if he disobey the command. There being an obligation upon the payor, the payee has a right. He is the determinate person towards whom the payor's obligation is to be performed. If the payor fail to fulfil his obligation, the payee may invoke the sovereign authority through the courts, to enforce the sanction.

The invoking of the sovereign authority through the courts, and the enforcement of the sanction by that authority, form together what we term the *remedy at law*.

It is the fear of the enforcement of the sanction that *binds* the obligor.

"A party lying under a duty, or upon whom a duty is incumbent, is liable to evil or inconvenience (to be inflicted by sovereign authority), in case he violate the duty or disobey the command which imposes it. The evil to be incurred by the party in case he disobey the command, enforces compliance with the command, or secures the fulfilment of the duty. In other words it inclines the party to obey the command, or to fulfil the duty or obligation which the command imposes

upon him. By reason of his liability or obnoxiousness to the eventual or conditional evil, there is a *chance* that he will *not* disobey; a chance which is greater or less, (foreign considerations apart), as the evil itself, and the chance of incurring it by disobedience, are greater or less. The eventual or conditional evil to which the party is obnoxious, is styled a 'sanction;' or the law or other command is said to be *sanctioned* by the evil.

'To be obliged to do or forbear,' or 'to lie under a *duty* or *obligation* to do or forbear,' is to be liable or obnoxious to a sanction, in the event of disobeying a command. In other words, 'to lie under an obligation to do or forbear,' is to be liable to an evil from the author of the command in the event of disobedience.

"The party is bound or obliged to do or forbear, because he is obnoxious to the evil, *and because he fears the evil*. To borrow the current, though not very accurate expressions, he is *compelled* by his fear of the evil to do the act which is enjoined, or is *restrained* by his fear of the evil from doing the act which is forbidden." *Id.* Lecture 22, pp. 457, 458. To lessen the evil of the sanction, or to lessen the chance of its enforcement, is to impair the obligation. That is to say, (confining our statement to the case of a contract obligation,) to impede the obligee in the exercise of his power to invoke the sovereign authority through the courts, or to lessen the evil inflicted by that authority when invoked, is to impair the obligation of the contract. To take altogether from the obligee his power to invoke the sovereign authority through the courts, or to do away with the evil to be inflicted by that authority when invoked, is to extinguish entirely the obligation of the contract.

B.—Analysis of the Coupon-holder's Contract Rights. Effect of the existing State Legislation.

This court has decided that the right of the coupon-

holder is to have his coupon received for taxes when offered.

We have seen that there can be no right without a correlative obligation, and that the obligation that correlates with a right *in personam*, must be an obligation on the part of determinate persons. Upon whom, then, rests the obligation to receive the coupon for taxes when offered? It rests upon each and every collector of taxes. The highest court of the State has repeatedly decided that the State cannot by direct enactment remove that obligation. This court so decided in Hartman *vs.* Greenhow, and affirmed that decision in Antoni *vs.* Greenhow.

The act that was passed upon by the Supreme Court of Appeals of Virginia, in the case of Antoni *vs.* Wright, 22 Grat. 933, and by this court in the case of Hartman *vs.* Greenhow, 102 U. S., 672, was the act entitled "An act declaring what shall be received in payment of Taxes or other demands of the State," in force March 7, 1872, and was as follows:

1. "Be it enacted by the general assembly of Virginia, that hereafter it shall not be lawful for the officers charged with the collection of taxes or other demands of the State, due now, or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States treasury notes or notes of the National Banks of the United States.

2. All acts or parts of acts inconsistent with this act are hereby repealed.

3. This act shall be in force from and after its passage."

That act was declared void as against the coupon-holder. Why? Because it was held to impair the obligation of the coupon-holder's contract. But the act was directed to the "officers charged with the collection of taxes and other demands of the State." How, then, did the act impair the obligation of the contract between the

State and the coupon-holder? Because the act sought to annul the obligation of the said officers towards the coupon-holder, which obligation had been irrevocably imposed upon said officers by the act of March 30, 1871, when it provided that the coupons should be receivable for taxes, &c. If there had been no such obligation resting upon the said officers, the act of March 7, 1872, could not have impaired it. Unless that obligation had been imposed by the contract between the State and the coupon-holder, that act could not have been held to impair the obligation of the contract. Again, if the duty imposed on the collecting officers by the act of March 30, 1871, had been a mere duty of honor, unenforcible by the coupon-holder, then there would have been no legal obligation resting upon those officers, towards the coupon-holder. There being no legal obligation, the inhibition of the Federal Constitution could not have been invoked by the coupon-holder, to render void the act of March 7, 1872. There would have been nothing on which the Federal Constitution could act.

All the decisions both of this court and of the Supreme Court of Appeals of Virginia presuppose the existence of a valid, enforcible obligation on the part of the collecting officers, and that an obligation correlative with the coupon-holder's right under his contract.

The self-same act that conferred upon the coupon-holder his contract rights, imposed upon the collecting officers duties correlative with those rights. By virtue of the Federal Constitution those rights and those duties are all irrevocable. The act of March 30, 1871, is to-day the irrepealable law governing the collecting officers in their dealings with the coupon-holder.

Hence we find that the single question discussed by the Court in Antoni *vs.* Greenhow was the question of the remedies of the coupon-holder against the collector to enforce the obligation of the latter toward the former

under the contract between the State and the coupon-holder. If there be no such obligation, or if the coupon-holder be not entitled to any remedy for its enforcement, then all the discussion in the opinion of this court in that case is worse than vain.

The State itself could not be sued for a violation of its contract to pay. The peculiar value therefore to the coupon-holder of the provision that his coupon should be receivable for taxes, was that thereby legal obligations correlative with his rights were imposed upon the collectors, and that by reason of those obligations his rights became legal rights, protected by the Federal Constitution.

The obligations imposed upon the collectors were (1) to receive the coupon and (2) to treat the payment in coupons as an effectual payment; in short, to receive the coupons *for taxes*. The positive obligation to receive the coupons *for taxes* involved necessarily the negative obligation to abstain from taking the coupon-holder's property for those taxes. It is with the negative obligation that we have to do in the present argument. There can be no legal obligation without a *sanction*; and no sanction can be effectual without a remedy for its enforcement. The term remedy is currently used in two senses. (1). It is used to mean that by which an obligation is created and enforced. In this meaning it includes both the sanction and the proceeding by which the sanction is enforced. (2). It is used to mean only the proceeding by which the sanction is enforced; that is to say, the process in the courts by which the sovereign authority is invoked, to inflict the penalty of the sanction. We shall use the term in the first meaning, unless otherwise indicated. What, then, were the remedies which created and enforced the obligation of the tax-collector to abstain from taking the coupon-holder's property for taxes already paid in coupons? They were,

1*st.*—*The action of Detinue.*

By this action the coupon-holder recovered his property, if seized, with damages for its detention and costs, or an alternative judgment for the value of his property, with interest and costs.

2*d.*—*The action of Trespass.*

By this action, in one or the other of its forms, he could recover all damage arising from the collector's acts with costs; and by showing that those acts were committed deliberately after notice of their illegality, he could obtain an award of exemplary damages.

3*d.*—*Injunction in Equity.*

By injunction the attempted breach of the obligation could be restrained, under pain of contempt of court and its consequences; and the decree carried costs.

4*th.*—*An action of assumpsit for money illegally extorted.*

He could pay the sum demanded under protest and sue the collector in assumpsit to recover it. If successful, he would recover the amount, with interest and costs.

All the above remedies lay against the collector individually, in fact as well as name. Each supplied a sanction sufficient to compel compliance with the obligation, through fear of the consequences of a breach. If the collector violated the obligation that rested upon him, he became obnoxious to the sanctions embraced in all these remedies. It was the existence of these remedies and of the sanctions that they embraced, that created the legal obligation on the part of the collector to abstain from seizing the coupon-holder's property after payment of taxes in coupons. The sovereign command created the duty on the part of the collector towards the coupon-holder; the remedies we have named made that duty obligatory through the fear of the sanction which each of

them contains. That obligation on the part of the collector lies *towards* the coupon-holder by reason of his contract. Hence the Federal Constitution renders void all State legislation that impairs that obligation.*

The Act of January 26th, 1882, seeks in three ways to extinguish the obligation resting upon the collector to receive the coupon-holder's coupon *for taxes; i. e.*, the obligation positively to receive and negatively to abstain from seizing property thereafter.

(1). The Act seeks to abrogate the duty to receive for taxes under the command of the contract by the counter-command not to receive.

(2). The act seeks to extinguish the obligation resting upon the collector *towards the coupon-holder*, by taking away all the remedies which supply the sanction of that obligation.

(3). The act attaches a public sanction in the shape of a severe penalty to the counter-command not to receive, and seeks thus to create an absolute duty in direct opposition to the obligation of the collector towards the coupon-holder.

Now it has been decided that the State cannot, by a counter-command, abrogate the duty of the collector to receive the coupon for taxes, because such abrogation would impair the obligation of the coupon-holder's contract. The Court will notice that the terms of the acts of January 26th, 1882, are substantially identical with those of the acts of March 7, 1872. We may take it, then, as already decided that so much of this Act of January 26th as seeks, by counter-command, to abrogate the duty of the collector to receive the coupon *for taxes*, or seeks to cre-

*We quote the portion of the 24 section of "The Funding Act of March 30, 1871," as follows: "The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face."

ate an absolute duty in direct opposition thereto, is void as against the coupon-holder. How, then, can that portion of the act be valid, which takes away all that makes the collector's duty obligatory toward the coupon-holder —all that makes the receipt of the coupon for taxes more than a favor to be granted or denied at the collector's pleasure. If the duty be not obligatory, how could the coupon-holder be heard to complain that it had been abrogated? If there were no *obligation* binding the collector to receive the coupon for taxes, how could this Court decide that an act forbidding that receipt impaired the *obligation of the contract?*

But it is said that the act of January 26th does not take away all remedies, for it substitutes a new remedy in place of those which it takes away. The procedure provided by that act is not a remedy which supplies a sanction to enforce the collector's duty to receive the coupons for taxes. The proceeding is against the collector only in name. The Court of Appeals have so decided.—Brown, Davis & Co. *vs.* Greenhow, Virginia Law Journal, March, 1885. A remedy against B. can never make binding the obligation of A.

The obligation of the collector is (1) positively to receive and (2) negatively to abstain from seizing property. So far from enforcing the obligation in either of its forms, the alleged remedy provided by the act of January 26th requires that the collector shall refuse to receive and shall seize the property of the coupon-holder. It matters not whether the property seized be money or goods.

To say that this alleged remedy is the equivalent of all the remedies we have enumerated, is an abuse of language. We have already pointed out that the term remedy is used in two distinct meanings.

(1). It is used to mean that, the existence of which distinguishes an obligation from a favor. In this mean-

ing it includes both the sanction and the process by which the sanction is enforced.

(2). It is used to mean only the process by which a sanction is enforced.

When it is said that the *remedy* may be changed without impairing the obligation of a contract, the term remedy is used in its second meaning. So long as he to whom the obligation is due, is not impeded in his right to invoke the sovereign authority through the courts, the form of proceeding by which he shall invoke that authority, is subject to regulation. The sanction which is supplied by the remedies existing at the time of the contract (using the term remedy in its first meaning), constitutes the binding force of the contract, and cannot be lessened without impairing the obligation of the contract.

In determining whether two remedies are equivalent in enforcing the obligation of a contract, it will not do to look merely at the redress which each will give to the obligee, *after* breach of the obligation. Commonly, the redress given the obligee comes from the obligor, and the giving of it inflicts a correspondingly heavy sanction upon the obligee; but this is not always true.

An obligation looks to the future. A man can be bound to a future act only through apprehension of what will come to him if he fail to do the act. Therefore one must look also to the sanction supplied by each of the two remedies to be compared if one would determine the binding force that each gives to the obligation of the contract. A change of remedy that makes it more desirable for the party obliged to commit a breach of his obligation impairs the obligation. *A fortiori*, to do away with all remedies against the party obliged impairs the obligation.

The party in whom the right resides, is entitled to his

contract as made, and cannot be compelled to release any of the correlative obligations imposed upon others by that contract. The alleged remedy provided by the act of January 26th does not pretend to enforce the obligation of the collecting officer to receive the coupons *for taxes*, either in the negative or positive form of that obligation. It does not lie against the officer individually: but if it did, it would be but a less effectual form of the least effectual remedy that was before afforded the coupon-holder. Still less could it take the place of the coupon-holder's remedy by injunction in equity, the remedy of all others to protect against the breach of a negative obligation.

We therefore submit:

1st. That obligations correlative with the coupon-holder's contract rights were imposed on the collecting officers of the State, by the act of March 30th, 1871.

2d. That any act of the State that impairs the binding force of those obligations either directly by counter-command, or indirectly by taking away the remedies for their enforcement, is void.

3d. That the act of January 26th, 1882, is void in that it seeks to destroy those obligations of the coupon-holder's contract, both by counter-command and by taking away all the remedies for their enforcement.

HUGH W. SHEFFEY,
JOHN K. COWEN,
HUGH L. BOND, JR.,
Of Counsel.

114-317

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~972~~ 590

SAMUEL S. CARTER, PLAINTIFF IN ERROR,

vs.

SAMUEL C. GREENHOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 22, 1883.

SUPREME COURT OF THE UNITED STATES.

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tion against the defendant, which declaration is in words and figures, as follows:

Declaration.

Circuit Court of the United States for the Eastern District of Virginia.

SAMUEL S. CARTER *vs.* SAMUEL C. GREENHOW.

Samuel S. Carter, plaintiff, complains of Samuel C. Greenhow, defendant, of a plea of trespass on the case for that the said plaintiff is a citizen of the State of Virginia and a resident of the city of Richmond in said State. That the plaintiff owns property in said city, and that he was lawfully assessed on said property by the officers of the State of Virginia, whose duty it was under the laws of Virginia to make such assessment, with taxes to be paid to the State of Virginia for the year 1882, and that said taxes were due and leviable for, on, and after the first day of December, 1882.

That the defendant, Samuel C. Greenhow, is the treasu-
4 rer of the city of Richmond in the State of Virginia; and that the laws of Virginia make it his duty to collect all taxes due to the State of Virginia by residents of said city on property situated and being in said city. That on the 3d day of May, 1883, the plaintiff was indebted to the said State of Virginia on account of the taxes so assessed upon his property as aforesaid for the year 1882, and that on said last-named date, he tendered to the defendant in payment of his said taxes coupons cut from bonds issued by the State of Virginia under the provisions of the act of the General Assembly of the State of Virginia, approved March 28th, 1879, entitled "An act to provide a plan of settlement of the public debt," which coupons, together with a small amount of lawful money of the United States tendered at the same time, amounted exactly to the sum so due by the plaintiff for taxes as aforesaid, and which coupons were due and past maturity, in payment of his said taxes so due as aforesaid. That by the terms of the act of the General Assembly under which said coupons were issued, the said coupons
5 are receivable in payment of all taxes due to the State of Virginia, and that each of said coupons bore upon its face the contract of the State of Virginia that it should be received in payment of taxes due to said State. That the defendant refused to receive the said coupons and money in payment of the taxes so due by the plaintiff. That after said tender the said defendant unlawfully entered into and upon the plaintiff's premises and place of business and levied upon and seized the plaintiff's property and carried the same away to sell the same in payment of plaintiff's taxes. That plaintiff was always ready and willing to deliver to the defendant in payment of said taxes, up to the

moment when the defendant so levied upon his said property, the said coupons and money, and he many times offered to do so, but the defendant always refused to receive the same. That the plaintiff has the right under the Constitution of the United States to pay his said taxes to the said defendant in the said coupons and money, and that this right is secured to him by
6 the Constitution of the United States. That when the defendant refused to receive the said coupons and money in payment of the taxes so due as aforesaid by the plaintiff, he did so under color of and by the command of an act of the General Assembly of the State of Virginia, approved January 26th, 1882, entitled "An act to provide for the more efficient collection of the revenue, to support government, maintain the public schools, and to pay interest on the public debt," which act forbids collectors of taxes due to said State to receive in payment thereof anything except gold, silver, United States Treasury notes, and national bank currency; and that when he so levied upon the plaintiff's property he did so by virtue of and under the command of the 18th section of an act of the General Assembly of the State of Virginia, approved April 1st, 1879, which act is chapter sixty of the laws published by authority of the General Assembly of the State of Virginia for the special session of 1879, and by virtue of and under the command of other statutes
7 enacted by the General Assembly of the State of Virginia. That the said two last-mentioned acts of the General Assembly of the State of Virginia, and the other mentioned statutes of said State, commanding the defendant to levy so as aforesaid upon the property of the plaintiff, are repugnant to the Constitution of the United States, and are therefore void; that in refusing to receive the said coupons and money in payment of said taxes, and in levying on and seizing the plaintiff's property for said taxes, after the plaintiff had tendered the same in payment thereof, the defendant deprived the plaintiff of a right secured to him by the Constitution of the United States, under color of statutes enacted by the General Assembly of the State of Virginia, to the damage of the plaintiff two hundred dollars, ($200,) and therefore he brings this suit.

WM. L. ROYALL, *P. Q.*

And on the same day, to wit: on the 7th day of May, 1883, came the defendant, by his attorney, and filed his demur-
8 rer to the plaintiff's declaration, which demurrer is in the following words:

States to hear and decide it and them as soon as its convenience will permit it.

September 8th, 1883. S. C. GREENHOW.

STATE OF VIRGINIA, }
City of Richmond, } *to wit:*

This day C. M. Ragland personally appeared before me, J. M. Skinner, a notary public for the city of Richmond, and made oath that he is well acquainted with the handwriting of S. C. Greenhow, who is the treasurer of the city of Richmond, and that the foregoing is his signature.

Given under my hand this 14th day of September, 1883.

J. M. SKINNER, *N. P.*

13 *Bond.*

Know all men by these presents, that we, William L. Royall and William R. Trigg, are held and firmly bound unto Samuel C. Greenhow in the full and just sum of five hundred dollars, to be paid to the said Samuel C. Greenhow, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas, lately, at a circuit court of the United States for the Eastern District of Virginia, in a suit depending in said court between Samuel S. Carter, plaintiff, and Samuel C. Greenhow, defendant, judgment was rendered against the said Samuel S. Carter; and the said Samuel S. Carter having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit,

14 and a citation directed to the said Samuel C. Greenhow citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the eighth day of October next.

Now, the condition of the above obligation is such, that if the said Samuel S. Carter shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. L. ROYALL, [SEAL.]
W. R. TRIGG, [SEAL.]

Approved by HUGH L. BOND, *C't Judge.*

I, M. F. Pleasants, clerk of the circuit court of the United States for the Eastern District of Virginia, hereby certify that

the above is a true copy of the bond filed and remaining in the papers of the cause in the said court.

M. F. PLEASANTS, *Clerk.*

15 And on another day, to wit: on the fifth day of September, 1883, came the plaintiff, by his attorney, and filed his assignment of error and prayer for reversal, as follows:

Circuit Court of the United States for the Eastern District of Virginia.

SAMUEL S. CARTER *vs.* SAMUEL C. GREENHOW.

Assignment of Error and Prayer for Reversal.

The plaintiff assigns for error the judgment of the court sustaining the defendant's demurrer to the plaintiff's declaration, and giving judgment against the plaintiff.

The plaintiff prays for a reversal of this judgment.

SAMUEL S. CARTER.
By WM. L. ROYALL,
His Attorney.

An opinion was filed in this cause by the circuit judge, which will be found in full in the record of the case of A. Austin Smith *vs.* Samuel C. Greenhow, sent up herewith.

16 UNITED STATES OF AMERICA, *Eastern District of Virginia.* } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete transcript of the record and proceedings of the cause therein named, as the same appears on file and record in my office.

In testimony whereof, I have hereto set my hand and affixed the seal of said court, at Richmond, this 14th day of September, 1883.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Endorsement on cover: E. Virginia C. C. U. S. No. 972. Samuel S. Carter, Plaintiff in Error, *vs.* Samuel C. Greenhow. Filed 22d September, 1883.